Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 22 FEBRUARY 10, 1988 No. 6

This issue contains:

AVAILABILITY OF BOUND VOLUMES

See inside back cover for ordering instructions

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 88–4)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR DECEMBER 1987

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: December 25, 1987.

Greece drachma:

December 1, 1987	$0.007657
December 2, 1987	.007662
December 3, 1987	.007619
December 4, 1987	.007625
December 7, 1987	.007587
December 8, 1987	.007599
December 9, 1987	.007628
December 10, 1987	.007728
December 11, 1987	.007774
December 14, 1987	.007749
December 15, 1987	.007704
December 16, 1987	.007701
December 17, 1987	.007737
December 18, 1987	.007725
December 21, 1987	.007719
December 22, 1987	.007731
December 23, 1987	.007692
December 24, 1987	.007731
December 28, 1987	.007890
December 29, 1987	.007883
December 30, 1987	.007868
December 31, 1987	.007997

South Korea won:

December 1, 1987	$0.001250
December 2, 1987	.001250
December 3, 1987	.001251
December 4, 1987	.001251
December 7, 1987	.001251
December 8, 1987	.001251
December 9, 1987	.001251
December 10, 1987	.001252
December 11, 1987	.001252
December 14, 1987	.001252
December 15, 1987	.001252
December 16, 1987	.001252
December 17, 1987	.001252
December 18, 1987	.001253
December 21, 1987	.001253
December 22, 1987	.001253
December 23, 1987	.001253
December 24, 1987	.001253
December 28, 1987	.001255
December 29, 1987	.001256
December 30, 1987	.001257
December 31, 1987	.001256

Taiwan N.T. dollar:

December 1, 1987	$0.033921
December 2, 1987	.033944
December 3, 1987	.033979
December 4, 1987	.034014
December 7, 1987	.034048
December 8, 1987	.034106
December 9, 1987	.034153
December 10, 1987	.034188
December 11, 1987	.034294
December 14, 1987	.034400
December 15, 1987	.034614
December 16, 1987	.034722
December 17, 1987	.034831
December 18, 1987	.034904
December 21, 1987	.034953
December 22, 1987	.034953
December 23, 1987	.034965
December 24, 1987	.034965
December 28, 1987	.034965
December 29, 1987	.034965
December 30, 1987	.034965
December 31, 1987	.034965

(LIQ-03-01 S:COM CIE)

Dated: January 19, 1988.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 88–5)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE FOR DECEMBER 1987

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 87–141 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: December 25, 1987.

Austria schilling:

December 1, 1987	$0.086170
December 2, 1987	.085911
December 3, 1987	.085561
December 4, 1987	.085251
December 7, 1987	.084962
December 8, 1987	.085114
December 9, 1987	.085361
December 10, 1987	.086843
December 11, 1987	.087070
December 14, 1987	.087108
December 15, 1987	.087108
December 16, 1987	.087184
December 17, 1987	.087527
December 18, 1987	.087032
December 21, 1987	.086957
December 22, 1987	.087108
December 23, 1987	.086806
December 24, 1987	.087184
December 28, 1987	.088869
December 29, 1987	.089008
December 30, 1987	.089047
December 31, 1987	.090293

Belgium franc:

December 1, 1987	$0.028969
December 2, 1987	.028885
December 3, 1987	.028785
December 4, 1987	.028686
December 7, 1987	.028637
December 8, 1987	.028670
December 9, 1987	.028727
December 10, 1987	.029155
December 11, 1987	.029240
December 14, 1987	.029257
December 15, 1987	.029291
December 16, 1987	.029300
December 17, 1987	.029446
December 18, 1987	.029274

Belgium franc (continued):

December 21, 1987	$0.029283
December 22, 1987	.029369
December 23, 1987	.029206
December 24, 1987	.029326
December 28, 1987	.029895
December 29, 1987	.029931
December 30, 1987	.029967
December 31, 1987	.030395

Denmark krone:

December 1, 1987	$0.157085
December 2, 1987	.156912
December 3, 1987	.155642
December 4, 1987	.155159
December 7, 1987	.154919
December 8, 1987	.155352
December 9, 1987	.155824
December 10, 1987	.158078
December 11, 1987	.158793
December 14, 1987	.158983
December 15, 1987	.158983
December 16, 1987	.158667
December 17, 1987	.159744
December 18, 1987	.158730
December 21, 1987	.158806
December 22, 1987	.159236
December 23, 1987	.158441
December 24, 1987	.158932
December 28, 1987	.162536
December 29, 1987	.162338
December 30, 1987	.162417
December 31, 1987	.165017

Finland markka:

December 1, 1987	$0.246124
December 2, 1987	.245278
December 3, 1987	.244379
December 4, 1987	.243309
December 7, 1987	.243427
December 8, 1987	.243605
December 9, 1987	.244499
December 10, 1987	.247831
December 11, 1987	.248447
December 14, 1987	.247678
December 15, 1987	.247066
December 16, 1987	.247402
December 17, 1987	.248756
December 18, 1987	.247372
December 21, 1987	.247036
December 22, 1987	.247831
December 23, 1987	.246914
December 24, 1987	.248139
December 28, 1987	.251383
December 29, 1987	.250941
December 30, 1987	.251130
December 31, 1987	.249066

France franc:

December 1, 1987	$0.178063
December 2, 1987	.177888
December 3, 1987	.177226
December 4, 1987	.176616
December 7, 1987	.176460
December 8, 1987	.176788
December 9, 1987	.177380
December 10, 1987	.179986
December 11, 1987	.180668
December 14, 1987	.180832
December 15, 1987	.180865
December 16, 1987	.180636
December 17, 1987	.182183
December 18, 1987	.180766
December 21, 1987	.180946
December 22, 1987	.181554
December 23, 1987	.180799
December 24, 1987	.181620
December 28, 1987	.184740
December 29, 1987	.185082
December 30, 1987	.185219
December 31, 1987	.187688

Germany deutsche mark:

December 1, 1987	$0.606612
December 2, 1987	.604778
December 3, 1987	.602591
December 4, 1987	.599161
December 7, 1987	.598265
December 8, 1987	.599233
December 9, 1987	.600889
December 10, 1987	.611060
December 11, 1987	.612933
December 14, 1987	.613121
December 15, 1987	.613309
December 16, 1987	.613196
December 17, 1987	.616333
December 18, 1987	.611995
December 21, 1987	.611808
December 22, 1987	.614062
December 23, 1987	.611060
December 24, 1987	.613874
December 28, 1987	.626370
December 29, 1987	.626645
December 30, 1987	.627353
December 31, 1987	.636618

Ireland pound:

December 1, 1987	$1.611500
December 2, 1987	1.605500
December 3, 1987	1.598500
December 4, 1987	1.593500
December 7, 1987	1.592000
December 8, 1987	1.595000
December 9, 1987	1.601500

Ireland pound (continued):

December 10, 1987	$1.618000
December 11, 1987	1.628500
December 14, 1987	1.631500
December 15, 1987	1.632500
December 16, 1987	1.631200
December 17, 1987	1.636500
December 18, 1987	1.628000
December 21, 1987	1.628000
December 22, 1987	1.631500
December 23, 1987	1.620000
December 24, 1987	1.629000
December 28, 1987	1.659000
December 29, 1987	1.662000
December 30, 1987	1.661000
December 31, 1987	1.684000

Italy lira:

December 1, 1987	$0.000822
December 2, 1987	.000820
December 3, 1987	.000816
December 4, 1987	.000814
December 7, 1987	.000812
December 8, 1987	.000813
December 9, 1987	.000816
December 10, 1987	.000827
December 11, 1987	.000831
December 14, 1987	.000831
December 15, 1987	.000832
December 16, 1987	.000833
December 17, 1987	.000837
December 18, 1987	.000832
December 21, 1987	.000833
December 22, 1987	.000834
December 23, 1987	.000832
December 24, 1987	.000837
December 28, 1987	.000849
December 29, 1987	.000849
December 30, 1987	.000849
December 31, 1987	.000862

Japan yen:

December 1, 1987	$0.007519
December 2, 1987	.007536
December 3, 1987	.007524
December 4, 1987	.007527
December 7, 1987	.007530
December 8, 1987	.007535
December 9, 1987	.007553
December 10, 1987	.007728
December 11, 1987	.007782
December 14, 1987	.007811
December 15, 1987	.007837
December 16, 1987	.007857
December 17, 1987	.007921
December 18, 1987	.007868

Japan yen (continued):

December 21, 1987	$0.007869
December 22, 1987	.007902
December 23, 1987	.007890
December 24, 1987	.007929
December 28, 1987	.008120
December 29, 1987	.008097
December 30, 1987	.008104
December 31, 1987	.008247

Netherlands guilder:

December 1, 1987	$0.538938
December 2, 1987	.537346
December 3, 1987	.535475
December 4, 1987	.532623
December 7, 1987	.531632
December 8, 1987	.532623
December 9, 1987	.534188
December 10, 1987	.543183
December 11, 1987	.544811
December 14, 1987	.545108
December 15, 1987	.544959
December 16, 1987	.544751
December 17, 1987	.547495
December 18, 1987	.543774
December 21, 1987	.543626
December 22, 1987	.545405
December 23, 1987	.542888
December 24, 1987	.545405
December 28, 1987	.556483
December 29, 1987	.556638
December 30, 1987	.557724
December 31, 1987	.565931

Norway krone:

December 10, 1987	$0.156556
December 11, 1987	.156986
December 14, 1987	.156986
December 15, 1987	.156838
December 16, 1987	.156372
December 17, 1987	.156986
December 18, 1987	.156311
December 21, 1987	.156495
December 22, 1987	.156777
December 23, 1987	.156446
December 24, 1987	.157060
December 28, 1987	.159299
December 29, 1987	.159363
December 30, 1987	.159312
December 31, 1987	.160772

Portugal escudo:

December 1, 1987	$0.007427
December 2, 1987	.007396
December 3, 1987	.007405

Portugal escudo (continued):

December 4, 1987	$0.007350
December 7, 1987	.007345
December 8, 1987	.007366
December 9, 1987	.007388
December 10, 1987	.007452
December 11, 1987	.007485
December 14, 1987	.007499
December 15, 1987	.007496
December 16, 1987	.007482
December 17, 1987	.007513
December 18, 1987	.007488
December 21, 1987	.007493
December 22, 1987	.007499
December 23, 1987	.007463
December 24, 1987	.007479
December 28, 1987	.007619
December 29, 1987	.007587
December 30, 1987	.007570
December 31, 1987	.007680

Republic of South Africa rand:

December 1, 1987	$0.507500
December 2, 1987	.506000
December 3, 1987	.505000
December 4, 1987	.506300
December 7, 1987	.506000
December 8, 1987	.508300
December 9, 1987	.509500
December 10, 1987	.511000
December 11, 1987	.512500
December 14, 1987	.515500
December 15, 1987	.515800
December 16, 1987	.515000
December 17, 1987	.514000
December 18, 1987	.515500
December 21, 1987	.513000
December 22, 1987	.512500
December 23, 1987	.511300
December 24, 1987	.510000
December 28, 1987	.519000
December 29, 1987	.519300
December 30, 1987	.517500
December 31, 1987	.518000

Spain peseta:

December 1, 1987	$0.008973
December 2, 1987	.008965
December 3, 1987	.008901
December 4, 1987	.008861
December 7, 1987	.008857
December 8, 1987	.008877
December 9, 1987	.008897
December 10, 1987	.009016
December 11, 1987	.009066
December 14, 1987	.009044

Spain peseta (continued):

December 15, 1987	$0.009048
December 16, 1987	.009039
December 17, 1987	.009074
December 18, 1987	.009028
December 21, 1987	.009009
December 22, 1987	.009033
December 23, 1987	.009001
December 24, 1987	.009029
December 28, 1987	.009194
December 29, 1987	.009191
December 30, 1987	.009174
December 31, 1987	.009302

Sweden krona:

December 1, 1987	$0.167029
December 2, 1987	.166583
December 3, 1987	.165893
December 4, 1987	.165426
December 7, 1987	.165239
December 8, 1987	.165563
December 9, 1987	.166058
December 10, 1987	.167870
December 11, 1987	.168350
December 14, 1987	.168497
December 15, 1987	.168350
December 16, 1987	.168152
December 17, 1987	.168919
December 18, 1987	.168350
December 21, 1987	.168124
December 22, 1987	.168464
December 23, 1987	.168237
December 24, 1987	.168464
December 28, 1987	.171233
December 29, 1987	.171086
December 30, 1987	.171262
December 31, 1987	.172563

Switzerland franc:

December 1, 1987	$0.740192
December 2, 1987	.739645
December 3, 1987	.735835
December 4, 1987	.732869
December 7, 1987	.731797
December 8, 1987	.732869
December 9, 1987	.734754
December 10, 1987	.749344
December 11, 1987	.751315
December 14, 1987	.752899
December 15, 1987	.753012
December 16, 1987	.752729
December 17, 1987	.759301
December 18, 1987	.753296
December 21, 1987	.752162
December 22, 1987	.755572
December 23, 1987	.751597

Switzerland franc (continued):

December 24, 1987	$0.756716
December 28, 1987	.775194
December 29, 1987	.775795
December 30, 1987	.775494
December 31, 1987	.786473

United Kingdom pound:

December 1, 1987	$1.818000
December 2, 1987	1.812000
December 3, 1987	1.806500
December 4, 1987	1.798000
December 7, 1987	1.794000
December 8, 1987	1.796200
December 9, 1987	1.802000
December 10, 1987	1.830000
December 11, 1987	1.838000
December 14, 1987	1.837000
December 15, 1987	1.831500
December 16, 1987	1.831500
December 17, 1987	1.835500
December 18, 1987	1.825800
December 21, 1987	1.827000
December 22, 1987	1.830500
December 23, 1987	1.823500
December 24, 1987	1.831500
December 28, 1987	1.860000
December 29, 1987	1.861000
December 30, 1987	1.858000
December 31, 1987	1.886000

(LIQ-03-01 S:COM CIE)

Dated: January 19, 1988.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 101

PROPOSED AMENDMENT RELATING TO THE CUSTOMS FIELD ORGANIZATION—CHICAGO, IL, CLEVELAND, OH, AND FORT WAYNE, IN; CORRECTION

AGENCY: Customs Service, Treasury.

ACTION: Proposed rule; correction

SUMMARY: In Federal Register Document 87–28981, published on December 17, 1987 (52 FR 47948), it was proposed to amend the Customs Regulations by changing the boundaries of the Chicago and Cleveland Districts, and by designating the newly approved Customs facility at Fort Wayne, IN, as a Customs station. Written comments were invited concerning the proposal.

It has come to our attention that the description of the proposed Cleveland, Ohio District in the North Central Region was not worded correctly in the portion of the document describing the proposed amendments to section 101.3(b), Customs Regulations (19 CFR 101.3(b)). The corrected description of the proposed boundaries of the Cleveland, Ohio District is as follows:

> The States of Ohio, Kentucky, that part of the State of Indiana lying south of latitude 41° N.; that part of the state of Indiana lying east of longitude 86° W.; and the county of Erie in the State of Pennsylvania.

DATE: Comments must be received on or before February 16, 1988.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, Room 2324, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Joseph O'Gorman or John Lenihan, Office of Workforce Effectiveness and Development (202–566–9425).

Dated: January 26, 1988.

EDWARD T. ROSSE,
Acting Director,
Regulatory Procedures and Penalties Division.

[Published in the Federal Register, February 1, 1988 (53 FR 2767)]

U.S. Court of Appeals for the Federal Circuit

(Appeal Nos. 87-1087, 87-1252, and 87-1253)

SHARP CORP., ET AL., AND TOSHIBA CORP., ET AL., PLAINTIFFS-APPELLEES *v.* UNITED STATES, ET AL., DEFENDANTS-APPELLANTS

Peter J. Gartland, Shanley & Fisher, of New York, New York, argued for plaintiffs-appellees Sharp.

Robert H. Huey, Arent, Fox, Kintner, Plotkin & Kahn, of Washington, D.C., argued for plaintiffs-appellees Toshiba. *Mira Davidovski*, Arent, Fox, Kintner, Plotkin & Kahn, of Washington, D.C., of counsel.

David M. Cohen, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendants-appellants. *J. Kevin Horgan*, Department of Justice, of Washington, D.C., of counsel.

Appealed from: U.S. Court of International Trade.
Judge RAO.

(Decided January 21, 1988)

Before FRIEDMAN, NEWMAN, and ARCHER, *Circuit Judges*.

FRIEDMAN, *Circuit Judge*.

These are consolidated appeals by the United States from preliminary injunctions of the Court of International Trade that barred the government from taking certain actions in connection with its administrative reviews of portions of an antidumping order. We reverse.

I

A. The pertinent background facts are set forth in our opinion in *Matsushita Elec. Indus. Co.* v. *United States*, 823 F.2d 505 (Fed. Cir. 1987), where we reversed a similar preliminary injunction of the Court of International Trade:

> In 1971, the Secretary of the Treasury published T.D. 71-76, a "finding of dumping" that reported the Secretary's determination "that an industry in the United States is being injured by reason of the importation of television receiving sets, monochrome and color, from Japan sold at less than fair value within the meaning of section 201(a) of the Antidumping Act of 1921, as amended [then 19 U.S.C. § 160(a), now § 1673]." 5 Cust.

Bull. 151, 152, 36 Fed. Reg. 4597 (1971). [The appellees Sharp Corporation (Sharp) and Toshiba Corporation (Toshiba) were two of the parties subject to the antidumping order.]

The administration of the Antidumping Act was transferred to the Department of Commerce (Commerce) in 1979. *See* Exec. Order No. 12,175, 3 C.F.R. 463 (1980). In 1980, Commerce entered into settlement agreements with the importers of color television receivers from Japan, including [Sharp and Toshiba], respecting their potential liability for dumping duties assessed pursuant to T.D. 71–76. *See Montgomery Ward & Co., Inc.* v. *Zenith Radio Corp.*, 673 F.2d 1254 (CCPA), *cert. denied*, 459 U.S. 943, 103 S. Ct. 256, 74 L.Ed.2d 200 (1982). The agreements provided for the payment of roughly $70 million [of which Sharp paid $9,124,000 and Toshiba $7,600,000] * * * in settlement of all claims for duties assessed pursuant to T.D. 71–76 on television receivers imported on or before March 31, 1979.

* * * Under 19 U.S.C. § 1675(a) (1984), Commerce is required to review at least annually the basis and amount of duty to be assessed under an antidumping duty order, and to publish the results of each such review in the Federal Register. The Antidumping Act provides that, after such a review, Commerce "may revoke" the antidumping duty order. 19 U.S.C. § 1675(c) (1984). Commerce's regulations authorize revocation

> [w]henever the Secretary determines that sales of merchandise subject to an Antidumping Finding or Order * * * are no longer being made at less than fair value * * * and is satisfied that there is no likelihood of resumption of sales at less than fair value * * *. Ordinarily, consideration of such revocation * * * will be made only subsequent to [an administrative] review.

19 C.F.R. § 353.54(a) (1981–86) (Commerce's § 353.54 is substantively identical to the Treasury regulation that it replaced, § 153.44 (1980)).

The revocation of an antidumping duty order is presaged by the publication by Commerce of a "Notice of Tentative Determination to Revoke or Terminate." 19 C.F.R. § 353.54(e) (1981–86). "As soon as possible after publication," 19 C.F.R. § 353.54(f), but after opportunity has been provided "for interested parties to present views with respect to the tentative revocation," 19 C.F.R. § 353.54(e),

> the Secretary will determine whether final revocation * * * is warranted. In cases where an application for a revocation * * * is based on the absence of sales at less than fair value with respect to the imported merchandise and the dispositive date for establishing a two-year period of no sales at less than fair value is the date of publication of the Finding or Order, the Secretary may determine that a final revocation * * * is warranted only if the firm involved provides information showing no sales at less than fair value with respect to the subject merchandise up to the date of

publication of the "Notice of Tentative Determination to Revoke or Terminate."

19 C.F.R. § 353.54(f) (1981–86).

823 F.2d at 506–07.

B. 1. Following its administrative review of the two separate one-year periods between April 1, 1978 and March 31, 1981, for which it found there was no dumping, Commerce, on September 27, 1983, published a notice of its tentative revocation of TD 71–76 with respect to Toshiba. 48 Fed. Reg. 44101 (1983). In that notice, Commerce pointed out that Toshiba had made no shipments of television receivers between April 1, 1980 and March 31, 1982. The notice specified that a final revocation "could not be issued until administrative reviews [have] been completed on import of [television] receiving sets from April 1, 1982, through the date of this notice." Commerce has initiated three other annual reviews covering the period from April 1, 1981 to September 27, 1983.

Toshiba filed its complaint in the Court of International Trade on October 15, 1986. The complaint stated that it was designed "to required Defendants to comply with the antidumping law * * * as well as [the] April 28, 1980 Settlement Agreement * * *." Specifically, Toshiba sought:

> (i) to require Defendants to complete the administrative review under T.D. 71–76, the dumping finding covering television receiving sets, monochrome and color, from Japan, as to merchandise produced by Toshiba Corporation ("TC") for the period prior to September 27, 1983, specifically, the period April 1, 1981—March 31, 1982 ("third round"), and to conduct and complete such reviews for the periods April 1, 1982—March 31, 1983 ("fourth round"), and April 1, 1983—September 27, 1983 (partial fifth round") [sic] pursuant to a schedule established by the Court;
>
> (ii) to compel Defendants to determine, on the basis of the third, fourth, and partial fifth round reviews and Plaintiffs' assurances or, in the alternative, on the record in the proceeding undertaken by the Department of Commerce regarding the likelihood of the resumption of sales at less than fair value, whether final revocation of T.D. 71–76 as to TC is warranted;
>
> (iii) to enjoin Defendants from conducting any administrative reviews of T.D. 71–76, as to merchandise produced by TC for periods after September 27, 1983, unless and until it is determined that final revocation of T.D. 71–76 as to TC is not warranted, and;
>
> (iv) to require Defendants to use in these administrative reviews of Plaintiffs' merchandise, the "traditional methodology" for determining whether dumping margins exist, in accordance with the Settlement Agreement.

2. Following its review of the same two-year period, Commerce found that Sharp either had not dumped or had engaged in only a *de minimis* margin of dumping, and on August 18, 1983 published

notice of its tentative revocation of TD 71–76 with respect to Sharp. 48 Fed. Reg. 37506, 37508 (1983). Commerce also initiated administrative reviews of Sharp for the five subsequent periods between April 1, 1981 and February 28, 1986, but has not published the result of any of those reviews.

Sharp filed its complaint in the Court of International Trade on October 20, 1986. The complaint made substantially the same allegations and sought substantially the same relief as the Toshiba complaint.

C. The Court of International Trade granted preliminary injunctions in both cases.

The court rendered its major opinion in the *Toshiba* case. It held that Toshiba had met the requirements for a preliminary injunction with respect to irreparable injury. The court stated:

> [W]hile it is true than the ordinary consequences of antidumping duty procedures do not constitute irreparable harm, Commerce is not seeking ordinary annual reviews. It seeks to compel plaintiffs to submit data for three years within 45 days and to furnish these data under new accounting methodology. Plaintiffs have averred that it is improbable that they will be able to comply with Commerce's demands and that if Commerce follows its alternative course, using the best information available (e.g., the domestic manufacturers' data), they may be subject to an antidumping determination even though they are not indeed importing their merchandise at LTFV.

The court further ruled that Toshiba had shown that it probably would prevail on the merits, that the balance of hardship favored Toshiba, and that the public interest favored a preliminary injunction. The court entered the following injunction:

> The Court preliminarily enjoins defendants from conducting any administrative reviews under T.D. 7176 [sic] as to these plaintiffs until it has made a final determination as to the final revocation of T.D. 7176 with respect to plaintiffs' products covered by that order.
>
> [2] As to any reviews conducted by Commerce as necessary for its determination as to whether T.D. 71–76 should be revoked as to plaintiffs' products, Commerce is enjoined from changing its traditional methodology for determining any market values or other data necessary for its determination of this issue, that is Commerce must examine the information it requests and verify it using accounting procedures that were agreed to in the settlement agreement.

In its opinion in *Sharp,* rendered three days after *Toshiba,* the court ruled:

> The motion for the preliminary injunction in the instant action is supported by the same legal arguments in this case as in *Toshiba* and the defendants have opposed the issuance of the preliminary injunction herein on the same grounds that they relied on in that case.

> Without reiterating all the reasons why the preliminary injunction should issue herein (since they are those which supported the granting of the motion for the preliminary injunction in *Toshiba*), the Court hereby grants plaintiffs' motion for a preliminary injunction herein, and the defendants hereby are (1) temporarily enjoined and restrained from taking any steps to conduct administrative reviews under T.D. 71–76 as to the plaintiffs for periods subsequent to August 18, 1983, taking any other actions inconsistent with finalizing revocation or denying revocation [sic] of T.D. 71–76 as to plaintiffs; and from altering the "traditional methodology" for reviews of periods up to August 18, 1983.

In each opinion the court stated that is "reserves all other matters and motions now pending in this case." *Toshiba Corp.* v. *United States*, 657 F. Supp. 534 (Ct. Int'l Trade 1987); *Sharp Corp.* v. *United States*, No. 86–10–01299 (Ct. Int'l Trade Mar. 5, 1987) (unpublished order).

II

The government contents that the Court of International Trade had no jurisdiction to entertain these actions. It urges us not only to vacate the preliminary injunction but "also [to] remand these cases with instructions to dismiss the actions below for lack of jurisdiction because in *Toshiba* and *Sharp* the [Court of International Trade] is undeniably conducting proceedings in excess of its jurisdiction."

The government recognizes that the Court of International Trade "has jurisdiction under the All Writs Act, 28 U.S.C. § 1651, to compel antidumping determinations which have been unreasonably delayed in order to preserve the court's jurisdiction to review those final determinations." The government argues, however, that in these cases the Court of International Trade has attempted to control the manner in which Commerce conducts its administrative review of antidumping orders and that this judicial foray exceeds the court's authority.

The complaints in these cases, however, seek to compel Commerce to complete its processing of its ongoing administrative reviews and to decide whether TD 71–76 should be revoked with respect to Sharp and Toshiba. The government recognizes that the Court of International Trade has the authority to compel such action by Commerce if Sharp and Toshiba can establish that they are entitled to that relief. It is therefore difficult to understand the basis for the government's contention that the Court of International Trade has no jurisdiction over these cases.

The government's argument that the Court of International Trade has no authority to control Commerce's administrative reviews of the antidumping order really is a contention that judicial review of Commerce's interlocutory actions in conducting such review is premature, not that the court has no jurisdiction to consider

the question. It is an aspect of the exhaustion-of-administrative-remedies doctrine—that judicial review of administrative action is inappropriate unless and until the person seeking to challenge that action has utilized the prescribed administrative procedures for raising the point. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938). *See generally* 4 K. Davis, *Admin. Law* § 26.1 (1983).

As we explain in part III, we reverse the preliminary injunctions because Sharp and Toshiba would not suffer irreparable injury from complying with Commerce's directives relating to the administrative review. In these circumstances we find it unnecessary to consider the government's contention that any judicial review of the methods Commerce is using to conduct its administrative review must await Commerce's final decision on Sharp's and Toshiba's request that the antidumping order be revoked with respect to them.

III

On the merits, we agree with the government that the preliminary injunction cannot stand. As in *Matsushita*, the Court of International Trade's finding that permitting Commerce to proceed with its administrative reviews would subject Sharp and Toshiba to irreparable injury is clearly erroneous.

Although there are distinctions between the present cases and *Mitsushita*, the principle applied in *Matsushita* is equally applicable to the present cases and requires the same result: reversal of the preliminary injunction. *Cf. also UST, Inc.* v. *United States*, 831 F.2d 1028 (Fed. Cir. 1987), upholding, on the basis of *Matsushita*, the decision of the Court of International Trade (speaking through a different judge) that denied a preliminary injunction in a similar antidumping case (involving a different commodity) because "the appellants had not shown the irreparable injury necessary to justify a preliminary injunction." 831 F.2d at 1032.

The scope of the injunction in *Matsushita* was similar to those in the present cases. As we noted in *Matsushita*, there the Court of International Trade enjoined Commerce "from conducting any administrative reviews under T.D. 71–76 * * * until it has made a final determination as to the final revocation of T.D. 71–76 with respect to" Matsushita. The Court of International Trade also stated in that case that Commerce could not request "new" information for the period after the first three administrative reviews. 823 F.2d at 508–09. Although the latter statement did not specifically bar Commerce from changing its traditional methodology in conducting administrative reviews (as did the preliminary injunctions in the present case), that was its practical effect. For the court stated that "Commerce must examine the information and verify it using accounting procedures that were agreed to during these time periods" (823 F.2d at 509). The "new" information to which the Court of International Trade referred was based upon the new methodology.

The basis for the finding of irreparable injury in *Matsushita*, as we noted,

> was based upon Matsushita's
>
> > having to comply with Commerce's demands for data and verification of those years beyond those involved in the revocation determination decision. The compilation of data and its verification requires an expenditure of effort in both human and other resources for which [Matsushita] will not be recompensed should it be found that plaintiffs have not been dumping and that T.D. 71–76 is revoked as to them.

823 F.2d at 509.

In the present cases, the Court of International Trade similarly based its finding of irreparable injury on the "hardship" to Toshiba (and presumably also to Sharp) of complying with Commerce's request for information. The court stated that "Commerce's demand that they produce data for three years of sales within 45 days will require going through invoices by hand and involve thousands of invoices including both sales slips and receipts, and they have indicated that what the government is requiring of them may be impossible in some instances." As the government points out, however, "at the time when the CIT issued the preliminary injunctions in *Toshiba* and *Sharp*, Commerce was only asking Toshiba and Sharp to respond to a single questionnaire covering a one year time period."

The ground of the Court of International Trade's finding of irreparable injury thus is basically the same as that found insufficient in *Matsushita* to show such injury: the added burden that answering Commerce's questionnaire and furnishing information to Commerce would impose upon the companies subject to the dumping orders.

For the reasons explained in *Matsushita*, compliance with that request of Commerce does not constitute the kind of irreparable injury necessary to support a preliminary injunction. The factual distinctions between these cases and *Matsushita* do not justify a different result.

IV

Our reversal of the preliminary injunctions carries no implication with respect to any of the remaining issues in these cases which, as noted, the Court of International Trade specifically stated it was not deciding. More particularly, we indicate no views regarding the appropriate disposition by the Court of International Trade of the pending requests for mandamus relief directing Commerce expeditiously (1) to decide the pending administrative reviews, and (2) to determine whether the antidumping order should be permanently revoked with respect to *Sharp* and *Toshiba*.

In *UST*, we indicated our concern about "Commerce's lengthy and seemingly unwarranted delay in completing administrative re-

views of antidumping orders. The failure promptly to determine whether to make final a tentative decision to revoke is particularly troublesome." 832 F.2d at 1032. We also pointed out that Commerce's delay "appears attributable in part to a misunderstanding of our decision in *Freeport Minerals Co.* v. *United States,* 776 F.2d 1029 (Fed. Cir. 1985)," which held "only that the data upon which Commerce relied in determining whether to make final a tentative determination to revoke 'must be current "up to the date of publication of the 'Notice of Tentative Determination to Revoke or Terminate,' "'" but not "up to the date of the final determination." 831 F.2d at 1032.

The government has recognized the power of the Court of International Trade to grant such affirmative relief in appropriate circumstances. The determination whether to do so and the terms and conditions of any directive to Commerce are matters for the Court of International Trade to determine in the first instance, in the exercise of its sound discretion.

CONCLUSION

The preliminary injunctions of the Court of International Trade are

REVERSED

(Appeal No. 87–1344)

LUCIANO PISONI FABBRICA ACCESSORI INSTRUMENTI MUSICALI AND ENZO PIZZI, INC., PLAINTIFFS-APPELLANTS *v.* UNITED STATES, DEFENDANT-APPELLEE

John Gurley, Klayman & Gurley, of Washington, D.C., argued for plaintiffs-appellants. With him on the brief were *Larry Klayman* and *Michael Diedring.*

Elizabeth C. Seastrum, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellee. With her on the brief were *Richard K. Willard,* Assistant Attorney General, *David M. Cohen,* Director and *Velta A. Melnbrencis,* Assistant Director. Also on the brief were *Douglas A. Riggs,* General Counsel, *M. Jean Anderson,* Chief Counsel for International Trade and *Paul C. Aiken,* Attorney-Advisor, Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel.

Appealed from: U.S. Court of International Trade.
Judge DICARLO.

(Decided January 20, 1988)

Before NIES, BISSELL, and MAYER, *Circuit Judges.*

MAYER, *Circuit Judge.*

OPINION

This appeal is from an order of the United States Court of International Trade denying an application for attorney fees and other expenses under the Equal Access to Justice Act because the position of the United States was substantially justified. We affirm.

BACKGROUND

On September 12, 1984, the Department of Commerce (Commerce) issued an antidumping order on pads for woodwind instrument keys from Italy. 49 Fed. Reg. 37,137. Appellants, Luciano Pisoni Fabbrica Accessori Instrumenti Musicali and Enzo Pizzi, Inc. (collectively Pisoni), are respectively the Italian producer and American importer of these pads. In the Court of International Trade, they contested the final determinations of Commerce and the International Trade Commission which provided the bases for the antidumping order.

The court upheld Commerce's decision to initiate and continue the antidumping investigation, but it determined "that Commerce's comparison of pads without allowing for differences in the physical characteristics of the different ranges of pad sizes was unreasonable and not in accordance with law." It remanded for a merchandise adjustment under 19 C.F.R. § 353.16. *Luciano Pisoni Fabbrica Accessori* v. *United States*, 640 F. Supp. 255, 260 (CIT 1986). The court also determined that Commerce should have used daily exchange rates in its currency conversion methodology, saying, "It is not reasonable for Commerce to find dumping by a firm with only ten relevant home market sales during the period of the investigation solely because of Commerce's use of quarterly exchange rates." *Id.*

On remand, after making the merchandise adjustment and applying daily exchange rates, Commerce concluded that the dumping margin was de minimis and that the pads were not being sold at less than fair value in the United States. The court affirmed and dismissed the case, *Luciano Pisoni Fabbrica Accessori* v. *United States*, 645 F. Supp. 956, 957 (CIT 1986), and Commerce revoked the part of the antidumping order which applied to appellants' pads. 51 Fed Reg. 40,239.

Pisoni then applied for attorney fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A). The court declined to award them because it found that the government's actions were substantially justified. *Luciano Pisoni Fabbrica Accessori* v. *United States*, 658 F. Supp. 902, 907 (CIT 1987). Here on appeal, Pisoni contends it should have the award under the EAJA because Commerce's merchandise comparison and exchange rate conversion methodologies were determined by the Court of International Trade to be unreasonable and could not therefore be considered substantially justified.

DISCUSSION

Under the EAJA "a court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action * * * brought by or against the United States * * * unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). This court has defined "substantially justified" to require "that the Government show that it was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts." *Gavette* v. *Office of Personnel Management*, 808 F.2d 1456, 1467 (Fed. Cir. 1986) (in banc).

Because the Court of International Trade concluded Commerce's methodology for comparing the pads was "unreasonable," and instructed the department to use a different currency conversion method, Pisoni argues that the actions cannot be considered "clearly reasonable" for purposes of the EAJA. In Pisoni's view, if the government's position is unreasonable on the merits, it is unreasonable period, and the court should order the government to pay its attorneys.

This view ignores the differences between the trial court's inquiries on the merits and on the fee application. The first inquiry led to a legal conclusion derived from statutory standards; the other to a factual one. In reviewing an antidumping proceeding, the Court of International Trade will "hold unlawful any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1). When the court said Commerce's merchandise comparison methodology was "unreasonable," it was using a shorthand word for unsupported by substantial evidence on the record. *See F.T.C.* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 44 (D.C. Cir. 1985); *SSIH Equip. S.A.* v. *United States Int'l Trade Comm'n*, 718 F.2d 365, 381, 218 USPQ 678, 691 (Fed. Cir. 1983) (Nies, J., additional views) ("supported by substantial evidence" raises the question: Is a finding of fact "unreasonable"?); *cf. Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951); *Fischer & Porter Co.* v. *United States Int'l Trade Comm'n*, 831 F.2d 1574, 1577, 4 USPQ2d 1700, 1701 (Fed. Cir. 1987). Similarly, its conclusion that a dumping determination based solely on the use of quarterly exchange rates was "not reasonable" means unsupported by substantial evidence or otherwise not in accordance with law. We say this because the court decided the case in accordance with that statutory formula, regardless of the words chosen to announce its conclusion.

Notwithstanding that in this court substantial justification under the EAJA requires that the government's position be "clearly reasonable," a conclusion on the underlying merits that its actions were unreasonable because unsupported by substantial evidence or

not in accordance with law as contemplated by section 1516a(b)(1) is not the end of the inquiry. "[T]he EAJA was not intended to be an automatic fee-shifting device in cases where the petitioner prevails * * *. [S]ubstantial justification is to be decided case-by-case on the basis of the record." *Gavette,* 808 F.2d at 1467. "The mere fact that the United States lost the case does not show that its position in defending the case was not substantially justified." *Broad Ave. Laundry & Tailoring* v. *United States,* 693 F.2d 1387, 1391 (Fed. Cir. 1982). The decision on an award of attorney fees is a judgment independent of the result on the merits, and is reached by examination of the government's position and conduct through the EAJA "prism," *see Federal Election Comm'n* v. *Rose,* 806 F.2d 1081, 1090 (D.C. Cir. 1986), not by redundantly applying whatever substantive rules governed the underlying case.

But Pisoni cites a congressional statement which says, "Agency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the [EAJA]." H. R. Rep. No. 120, 99th Cong., 1st Sess. 9 (Pt. I 1985), *reprinted in* 1985 U.S. Code Cong. & Ad. News 132, 138. We agree with the D.C. Circuit that this is "spurious legislative history, as evidenced by renunciations of this precise statement in both Houses." *Rose,* 806 F.2d at 1090. This language does not prevent the denial of attorney fees and expenses where the underlying agency action is found to be unsupported by substantial evidence or otherwise not in accordance with law. Those are legal conclusions pursuant to separate substantive standards, which may cover a range of egregiousness, and would be reviewed as such. Under the EAJA, we review the trial court's finding that the government's position was substantially justified under the clearly erroneous standard because that is a factual decision. *Essex Electro Engineeers, Inc.* v. *United States,* 757 F.2d 247, 253 (Fed. Cir. 1985); *Alger* v. *United States,* 741 F.2d 391, 394 (Fed. Cir. 1984).

In deciding the department's merchandise comparison and exchange rate conversion activities were substantially justified, the court analyzed the government's arguments in light of the complexity, uniqueness, and newness of the issues and the availability of certain cost of production data. It came to a factual conclusion about the reasonableness of the government's position, which included an assessment that the government's legal arguments were tenable. We can overturn this only if it is clearly erroneous.

Pisoni argues that the dumping determination was not substantially justified because Commerce compared different groups of merchandise without making necessary adjustments for differences in the merchandise. This problem arose because Pisoni did not price its pads by specific size but by the average size of pads in a particular range of sizes. The size ranges for the pads sold in Italy, moreover, did not always correspond to the ranges used for the sale of these pads in the United States. Therefore, although Commerce said

it was comparing the identical pad sizes sold in Italy with those sold in the United States, as a result of Pisoni's peculiar pricing and sizing practices, identical pads were not compared.

A Commerce regulation provides, in pertinent part:

> In comparing the United States price with the selling price in the home market, * * * due allowance shall be made for differences in the physical characteristics of the merchandise in the markets being compared. In this regard, the Secretary [of Commerce] will be guided primarily by the differences in cost of production, to the extent that it is established to his satisfaction that the amount of any price differential is wholly or partly due to such differences, but, when appropriate, the effect of such difference upon the market value of the merchandise may also be considered.

19 C.F.R. § 353.16. Commerce decided against making a merchandise adjustment and provided this rationale:

> Although we considered restructuring the home market size ranges and associating weighted-average prices with the new ranges based on price increments among the existing size ranges, we ultimately disregarded this alternative in favor of the more straightforward approach of simply comparing the sales price of a particular pad size in the U.S. market with the sales price of the identical pad size and model in the home market. We did not consider an attempt to restructure the home market pricing to be appropriate, since it resulted in an adjustment for what appeared to be respondent's deliberate pricing strategy in each of the markets under review.

49 Fed. Reg. 28,295, 28,298. The court disagreed, however, and held that Commerce does not have unlimited discretion in deciding whether to make merchandise adjustments under section 353.16. 640 F. Supp. at 259. It thought "that a merchandise adjustment was required in this investigation partly because Commerce had verified cost of production data from which to make such an adjustment." 658 F. Supp. at 906.

In fact, Commerce did not have cost of production data for the relevant pads from Italy; Pisoni had only submitted it for the average pad sizes in the United States' ranges. As a result, on remand Commerce had to estimate the cost of average pad sizes in Italy in a manner that was of questionable accuracy. *Id.* In what it characterized as a "novel and complex matter," the court found that the merchandise adjustment was both difficult to compute and ultimately inconclusive. Commerce considered the issues in a thoughtful and thorough manner. Under the circumstances, we see no error in the court's finding that Commerce was clearly reasonable in deciding not to make a merchandise adjustment

Pisoni also contends that Commerce's use of quarterly instead of daily exchange rates was "skewed and improper" and violated the guidelines of *Melamine Chemicals, Inc.* v. *United States,* 732 F.2d

924 (Fed. Cir. 1984). On the merits, the court said, "It is not reasonable for Commerce to find dumping by a firm with only ten relevant home market sales during the period of the investigation solely because of Commerce's use of quarterly exchange rates." 640 F. Supp. at 260.

Commerce elected to use quarterly exchange rates pursuant to 19 C.F.R. § 353.56(a). Subsection (b), an exception to subsection (a), *Melamine Chemicals*, 732 F.2d at 929, provides:

> *Special rules for fair value investigations.* For purposes of fair value investigations, manufacturers, exporters, and importers concerned will be expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in prevailing exchange rates. *Where prices under consideration are affected by temporary exchange rate fluctuations, no differences between the prices being compared resulting solely from such exchange rate fluctuations will be taken into account in fair value investigations.* [Emphasis added.]

Subsection (b) "establishes a 'special rule' applicable only to those abnormal situations in which an *artificial* margin is caused *solely* by rapidly fluctuating, temporary exchange rates." *Melamine Chemicals*, 732 F.2d at 929.

Commerce considered the applicability of this subsection and *Melamine Chemicals* and decided they did not control the problem presented. In distinguishing subsection (b), it reasoned that (1) the exchange rate fluctuation reduced rather than created less than fair value margins; (2) the exchange rate declined in a constant and nonvolatile fashion which could not be considered a temporary fluctuation as contemplated by this subsection; and (3) the exporter failed to act within a reasonable time to take into account the differences in price resulting from the sustained changes in the prevailing rates. 49 Fed. Reg. at 28,297; *see* 658 F. Supp. at 906.

Commerce also distinguished *Melamine Chemicals*, the only case involving a currency conversion question, by noting:

> Regarding the appeals court decision on melamine from the Netherlands, it is abundantly clear that the court was concerned with temporary and volatile exchange rate fluctuations occurring during the period of investigation that created margins which would not have otherwise existed. Under these conditions, the court approved the use of exchange rates in effect during an earlier more stable period. *The exchange rates behavior in our present investigation differs markedly from that in melamine and, as stated earlier, tends to reduce rather than create margins.*

49 Fed. Reg. at 28,298 (emphasis added).

The court recognized this as a transaction in an "evolving area of the antidumping laws" and that Commerce "might have grounds" for distinguishing this situation from 19 C.F.R. § 353.56(b) and *Mel-*

amine Chemicals. 658 F. Supp. at 907. Commerce carefully considered the issues here and provided reasonable explanations for its approach. The correctness of its position on the merits is not before us, and we intimate no view on that. But even though the decision went against the government, the trial court concluded it did not persist in pressing a tenuous factual or legal position. *Gavette,* 808 F.2d at 1467. Apart from Pisoni's attempted equation of the government's loss on the merits with its entitlement to fees and expenses, nothing was argued to us that would suggest the court was wrong in this assessment.

CONCLUSION

Accordingly, the Court of International Trade's denial of Pisoni's application for attorney fees and expenses under the EAJA is

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 88–1)

DENNISON MANUFACTURING CO., PLAINTIFF *v.* UNITED STATES DEPARTMENT OF THE TREASURY, DEFENDANT

Court No. 87–05–00655

Before DICARLO, *Judge.*

[Action dismissed for lack of jurisdiction.]

(Decided January 8, 1988)

George E. Kersey, for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice (*J. Kevin Horgan* on the brief and *M. Martha Ries* at the argument) for defendant.

DICARLO, *Judge:* The United States, Department of the Treasury (defendant) moves pursuant to Rule 12 of the Rules of this Court to dismiss the complaint of the plaintiff, Dennison Manufacturing Company (Dennison), because the complaint fails to state a claim within this Court's jurisdiction and because Dennison lacks standing to commence this action. The Court finds that it is without jurisdiction and accordingly grants the motion to dismiss.

FACTS

According to the complaint, Dennison requested a Customs ruling as to the appropriate tariff classification and rate of duty for 55 GSM Hi Fi Thermo Base paper that Dennison sought to import from Switzerland. In a letter dated August 29, 1985, Customs stated that the thermiage process Dennison used was a decalcomania process, and that the thermo base paper appeared to be in condition, without further processing, to receive decalcomanias. The paper would thus be classifiable as "[d]ecalcomania paper, not printed: [s]implex" under item 254.30 of the Tariff Schedules of the United States (TSUS), at the then existing duty rate of 2.9% ad valorem.

Dennison claims that its purchasing manager attempted in writing and by phone "to obtain clarification of the Customs position." Complaint at 4. In a letter dated January 13, 1986, Customs with-

drew its earlier conclusion that the thermo base paper could receive decalcomanias without further processing, but affirmed that the paper would still be classifiable under item 254.30, TSUS, because (a) the thermiage heat transfer process is a decalcomania process, and (b) the imported paper is by design and function exclusively used as a carrier for decalcomanias.

An examination of the entry papers reveals that in 1985 and 1986 Dennison imported 21 shipments of thermo base paper under item 254.80, TSUS, at the duty rate of 0.8% ad valorem on entries made during 1985, and 0.4% on entries made during 1986. One other shipment, entry number 86–412369–9, was entered under item 254.85, TSUS, at 2.3% ad valorem. Exhibit A filed at the hearing on the motion to dismiss indicates that some of the entries have not yet been liquidated.

On September 5, 1986, Customs issues a pre-penalty notice under 19 C.F.R. § 162.77 for alleged violations of 19 U.S.C. § 1592 committed in importing the thermo base paper. Customs held a hearing and on December 19, 1986 issued a notice of penalty in the amount of $57,352.80. Dennison then petitioned Customs under 19 C.F.R. § 171.12 for mitigation of the penalty. Before Customs ruled on Dennison's petition, Dennison filed a complaint in this Court.

DISCUSSION

The United States Court of International Trade, like all federal courts established under Article III of the Constitution, is a court of limited jurisdiction. *United States* v. *Gold Mountain Coffee, Ltd.*, 8 CIT 247, 248, 597 F. Supp. 510, 513 (1984). Once jurisdiction is challenged, the plaintiff must prove that jurisdiction in this Court is proper. *Id.* at 248–49, 597 F. Supp. at 513; *United States* v. *Biehl & Co.*, 3 CIT 158, 160, 539 F. Supp. 1218, 1220 (1981). Dennison asserts that the Court has jurisdiction under 28 U.S.C. § 1581(i) (1982) and 28 U.S.C. § 1581(h) (1982).

28 U.S.C. § 1581(i) JURISDICTION

Dennison's complaint asserts jurisdiction under 28 U.S.C. § 1581(i), "since this action arises out of 19 U.S.C. § 1592, providing for duties on imported merchandise, and the administration, enforcement and payment of such duties." Contrary to Dennison's characterization of section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1982), that statute provides for civil penalties for fraud, negligence, and gross negligence in importing merchandise. Actions to collect penalties assessed under 19 U.S.C. § 1592 may only be instituted in this Court by the United States. 28 U.S.C. § 1582(l) (Supp. III 1985). This Court lacks jurisdiction to the extent that the government has not moved to collect any penalty assessed. *See Jose G. Flores, Inc.* v. *United States*, 11 CIT ——, Slip Op. 87–142 (Dec. 29, 1987).

Dennison seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1581(i) because it has been presented with a notice of penalty. Dennison has not yet suffered any injury because the United States has not moved to collect any penalty assessed. Dennison may not suffer any future injury if Customs rules in Dennison's favor on its pending petition for mitigation of the penalty. Section 1581(i) is the residual jurisdiction of the Court and may only be invoked when other available avenues of jurisdiction are manifestly inadequate or it is necessary to avoid extraordinary and unjustified delays caused by the exhaustion of administrative remedies. *Miller & Co.* v. *United States*, 824 F.2d 961, 963 (Fed Cir. 1987); *Traveler Trading Co.* v. *United States*, 11 CIT ——, Slip Op. 87–143, at 6 (Dec. 30, 1987); *Ferrostaal Metals Corp.* v. *United States*, 11 CIT ——, 664 F. Supp. 535, 537 (1987). The Court finds that Dennison, having been served with only a notice of penalty which the United States may decide not to move to collect, and having further a pending petition to mitigate the penalty, has not invoked the residual jurisdiction of this Court.

28 U.S.C. § 1581(h) Jurisdiction

At the hearing on the motion to dismiss, Dennison was granted leave to amend its complaint to allege an alternative basis for jurisdiction under 28 U.S.C. § 1581(h) (1982). That section bestows upon this Court

> exclusive jurisdiction of any civil action commenced to review, *prior to the importation of the goods involved,* a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be *irreparably harmed* unless given an opportunity to obtain judicial review prior to such importation.

28 U.S.C. § 1581(h) (1982) (emphasis added).

The plain language of section 1581(h) limits the scope of its application to prospective importations. That section thus confers no jurisdiction over the 22 entries that are the subject of Dennison's complaint, because that merchandise has already been imported. *See United States* v. *Uniroyal, Inc.*, 69 CCPA 179, 183, 687 F.2d 467, 471–72 (1982).

Additionally, to the extent that Dennison's prayer for relief is directed to future importations, Dennison has not demonstrated the "irreparable harm" Congress has required before this Court may exercise jurisdiction over an appeal of a ruling prior to the importation of goods and the filing and denial of a protest. The essence of "irreparable harm" is that the injury cannot receive reasonable redress. *See National Juice Products Ass'n* v. *United States*, 10 CIT ——, 628 F. Supp. 978, 984 (1986). The possibility that adequate compensatory or other corrective relief will be available at a later

date weighs heavily against a claim of irreparable harm. *National Corn Growers Ass'n* v. *Baker*, 9 CIT 571, 585–86, 623 F. Supp. 1262, 1275 (1985).

In this case Dennison has entered merchandise which has not yet been liquidated. If Customs liquidates that merchandise or reliquidates the already liquidated merchandise under item 254.30, TSUS, then Dennison will have 90 days in which to file a protest. *See* 19 U.S.C. § 1514(c)(2) (1982); 19 C.F.R. § 174.12(e) (1987). If Customs denies that protest, Dennison may then file an action in this Court within 180 days. *See* 28 U.S.C. § 2636(a) (1982).

Dennison has not shown any special circumstances which would enable it to avoid the traditional methods of obtaining judicial review of a disputed Customs classification. Absent a showing of exceptional circumstances, the traditional methods of obtaining judicial review must be employed. *Manufacture de Machines du Haut-Rhin* v. *Von Raab*, 6 CIT 60, 64, 569 F. Supp. 877, 882 (1983), *appeal dismissed*, No. 83–1341 (Fed. Cir. Dec. 29, 1983).

CONCLUSION

This Court lacks jurisdiction over this action. The motion to dismiss the complaint is granted.

(Slip Op. 88–2)

PACIFIC TRAIL SPORTSWEAR, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 86–09–01172

Before DICARLO, *Judge.*

[Plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment are denied.]

(Decided January 8, 1988)

Rode & Oualey (Michael S. O'Rourke) for plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Department of Justice (*Barbara M. Epstein*), for defendant.

DICARLO, *Judge:* Plaintiff challenges the United States Customs Service (Customs) classification of birch colored ski jackets entered July, 1985 as "[o]ther men's or boys' wearing apparel, not ornamented: [o]f manmade fibers: [n]ot knit: [o]ther: [c]oats * * * [o]ther," under item 379.95, Tariff Schedules of the United States (TSUS). Plaintiff moves for summary judgment, asserting that the ski jackets are properly classifiable as "[g]arments designed for rainwear, hunting, fishing, or similar uses, wholly or almost wholly of fabrics which are coated or filled, or laminated, with rubber or

plastics, which (after applying headnote 5 of schedule 3) are regarded as textile materials: * * * [o]ther," under item 376.56, TSUS. Defendant opposes plaintiff's motion and cross-moves for summary judgment affirming Custom's classification. The court denies both motions.

The question presented by plaintiff's motion for summary judgment is whether the passing of the "sprinkle test" by fabric samples of the imported ski jackets satisfies the requirement that the coating on those jackets visibly affect the surface of the material. The defendant agrees that if the "sprinkle test" is a valid means of making this factual determination then summary judgment in plaintiff's favor should be granted.

In *Kaplan Products & Textiles, Inc.* v. *United States*, 70 Cust. Ct. 166, C.D. 4425 (1973), the court considered whether cotton suede fabric treated to be water repellant was a coated fabric under headnote 2(a) of Schedule 3, part 4, subpart C, TSUS. Under that headnote, textile fabrics are deemed coated for purposes of the TSUS if the coating visibly and significantly affects the surface or surfaces of the material, otherwise than by change in color and regardless of whether the color is changed. The *Kaplan* court acknowledged that the hydrophobic effect of the treated fabric could be seen in that water sprinkled on such fabric formed round droplets which could be shaken off, but the Court found "the fact that the finish creates a water-repellant surface is entirely immaterial in the absence of any visible affect thereon." *Id* at 169. While the court reached its conclusion that the "sprinkle test" was not evidence of the coating's visible affect on the surface of the material based on the clear and unambiguous language of headnote 2(a), it also examined in detail the legislative history of that headnote and found such history consistent with the headnote's express wording.

Plaintiff has failed to show this Court that the conclusion reached in *Kaplan* has been rejected or overruled. Although in *Rosenthal Co.* v. *United States*, 81 Cust. Ct. 77, C.D. 4769, 460 F. Supp. 1246 (1978) *aff'd*, 67 CCPA 8, C.A.D. 1236, 609 F.2d 999 (1979), the *Kaplan* decision is discussed and distinguished, the legal significance of the "sprinkle test" as it relates to the definition of coated in headnote 2(a) was neither rejected by the trial court nor overruled by the appellate court.

Plaintiff has also failed to persuade this Court that it should not follow *Kaplan*. The Court denies plaintiff's motion for summary judgment.

Evidence is admissible to determine if the coating visibly affects the surface of the ski jackets. Therefore the defendant's cross-motion for summary judgment is denied.

Both motions for summary judgment are denied. So ORDERED.

(Slip Op. 88–3)

FUNDICAO TUPY S.A. AND TUPY AMERICAN FOUNDRY CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND CAST IRON PIPE FITTINGS COMMITTEE, DEFENDANT-INTERVENOR

Court No. 86–06–00765

Before *Judge* JAMES L. WATSON,
Judge DOMINICK L. DICARLO, and
Judge NICHOLAS TSOUCALAS.

[In a determination of sales in the United States at less than fair value, the International Trade Administration of the Department of Commerce acted within the limits of its discretion in refusing to accept the costs of sales to American distributors as sufficient proof of what the costs of sales to Brazilian distributors would have been. In finding material injury to a domestic industry, the International Trade Commission's use of the cumulation provision from the Trade and Tariff Act of 1984, 19 U.S.C. § 1677(7)(c)(iv) (Supp. III 1985), did not conflict with other provisions of law, was in harmony with the intention of Congress, did not conflict with the GATT Antidumping Code, was not unconstitutional, and was supported by substantial evidence on the administrative record.]

(Dated January 12, 1988)

Freeman, Wasserman & Schneider (*Patrick C. Reed* and *Jerry Wiskin*) for plaintiffs.

Richard K. Willard, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*J. Kevin Horgan*) and *Edwin J. Madaj, Jr.*, Attorney, Office of the General Counsel, U.S. International Trade Commission, for defendant.

Rose, Schmidt, Hasley & Di Salle (*Peter Buck Feller* and *Lawrence J. Bogard*) for defendant-intervenor.

WATSON, DICARLO, TSOUCALAS, *Judges:* Plaintiffs commenced this action challenging the final determinations of the International Trade Administration (ITA) and International Trade Commission (ITC) which resulted in an antidumping order on malleable cast iron pipe fittings from Brazil. Plaintiffs challenge the ITA's decision to disallow "an adjustment to the home market price for a level of trade difference between the United States and the home market sales claimed by plaintiffs because they failed to demonstrate that they had incurred different costs in selling at different levels of trade in the home market." *Malleable Cast Iron Pipe Fittings, Other Than Grooved, from Brazil*, 51 Fed. Reg. 10,898 (Mar. 31, 1986) (final dumping determination). Plaintiffs also contest the ITC's decision to cumulatively assess the volume and impact of Brazilian, Korean, and Taiwanese imports of the subject merchandise in finding that material injury was resulting to an industry in the United States.

The final determination by ITA of sales at less than fair value was issued on March 31, 1986. 51 Fed. Reg. 10,897. The final determination of material injury by the ITC appears in Certain Cast-Iron Pipe Fittings from Brazil, the Republic of Korea and Taiwan, Invs. Nos. 731–TA–278 through 280 (Final), USITC Pub. 1845 (May 1986); 51 Fed. Reg. 18,670 (May 21, 1986).

In *Fundicao Tupy S.A.* v. *United States,* 11 CIT ——, 652 F. Supp. 1538 (1987), Chief Judge Re assigned this action to a three-judge panel pursuant to 28 U.S.C. § 255(a) (1982) and Rule 77(d)(2) of the Rules of this Court.

Plaintiffs' first claim is that ITA erred in the determination that the cast iron pipe fittings were being sold here at less than fair value, by failing to make an adjustment downward of the foreign market value to account for asserted higher costs arising from the fact that these products are sold to *retailers* in the foreign market as opposed to *distributors* in the United States market. According to plaintiffs, this adjustment should have been made pursuant to 19 C.F.R. § 353.19, a regulation which sets out the authority of the ITA to make appropriate adjustments for difference in the level of trade from which the prices being compared are derived. The government takes the position that it cannot assume that the costs associated with selling to distributors in the United States would have been the same had this product been sold through distributors in Brazil; that it is reasonable to place a burden on the party seeking the benefit of those assertedly lower selling costs, of proving by credible evidence what such costs would have been, and that the burden was not satisfied in this proceeding.

Plaintiffs claim that their proof of the higher costs of retail sales in Brazil as opposed to the lower costs of sales to distributors in the United States satisfied that burden; that the burden proposed by the ITA would be impossible to satisfy and further, would conflict with the terms of the law governing the adjustments that should be made to foreign market value when sales in the foreign market and the United States market are in different commercial levels of trade. Plaintiffs assert that under Section 773(a)(4)(b) of the Tariff Act of 1930, *as amended,* 19 U.S.C. § 1677b(a)(4)(b), as well as the relevant regulation, 19 C.F.R. § 353.19 the ITA is *required* to adjust foreign market value whenever United States sales and home market sales occur in different commercial levels of trade, regardless of whether the party claiming the adjustment has demonstrated a basis for quantifying the adjustment.

The Court finds that the plaintiffs have overstated the difficulties of the burden placed on them and have proposed an excessively confined role for ITA in its decision on whether to adjust foreign market value.

The ITA's rejection of the United States costs of distributors sales as evidence of what the costs of distributors sales in Brazil would have been cannot be characterized as unreasonable or an abuse of discretion in the absence of proof that such costs are internationally uniform. It was open to plaintiffs to demonstrate the costs of such a distribution operation in Brazil by means of expert testimony and proof directly relating to the establishment of such a distribution network. Contrary to plaintiffs' assertion, this would not have violated the statutory ban on the use of pretended sales or fictitious

markets in arriving at foreign market value, a prohibition expressed in 19 U.S.C. § 1677b(a)(1) and 19 C.F.R. § 353.18. Those provisions are plainly intended to bar the use of falsified information and do not present an obstacle to the offering of evidence as to what costs might be in certain hypothetical situations.

It may be a fact of economic life that the costs of selling to a distributor in Brazil must be lower than the costs of selling to retailers for the simple reason that the distributor must be able to turn around and sell the articles to the retailers. However, it is a legal and administrative fact of life that the measurement of this lower cost is a duty of ITA which has the authority to impose such reasonable burdens of proof on the parties to the investigation as may be necessary to reach a final determination. The ITA was not bound to accept proof of the costs of sales to distributors in the United States as applicable to Brazil. This was not the holding of the court in *Silver Reed America, Inc.* v. *United States,* 7 CIT 23, 581 F. Supp. 1290 (1984), *rev'd on other grounds sub. nom. Consumer Products Div., SCM Corp.* v. *Silver Reed America, Inc.,* 3 Fed. Cir. (T) 83, 753 F. 2d 1033 (1985), *CIT remand order vacated, Silver Reed America, Inc.* v. *United States,* 9 CIT 221 (1985). In that action the court held that the ITA could not deny a level of trade cost adjustment solely because both the United States and home market purchasers of portable electric typewriters were made in large wholesale quantities. The court did not hold that the cost data provided by the plaintiff with respect to the cost expenses of wholesale transactions in the United States (as opposed to home market retail sales of typewriters) was sufficient for making of a determination as to the level of trade cost adjustment. Instead, the court remanded the case to the ITA in order for it to determine whether the plaintiff had adequately quantified its claimed adjustment. The remand order was never implemented because it was vacated by the court.

To summarize, the ITA acted within the limits of its discretion in refusing to accept the costs of sales to American distributors as sufficient proof of what the costs of sales to Brazilian distributors would have been. Plaintiffs refrained from offering proof of what such costs would have been in Brazil and therefore cannot complain that the result was arbitrary or capricious. *See generally Hercules, Inc.* v. *United States,* 11 CIT ——, Slip Op. 87–114 (Oct. 20, 1987).

The second issue in the case is whether or not, in reaching its determination of material injury, the ITC correctly joined imports from Brazil with those from Korea and Taiwan under the cumulation provision of the law. In essence, the new language added in 1984 provides that when the ITC is considering the factors of the volume of imports on prices in the United States, in the course of making its determination as to whether or not material injury is being caused, it shall "cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like

products of the domestic industry in the United States." 19 U.S.C. § 1677(7)(c)(iv) (Supp. III 1985).

Plaintiffs argue that the ITC unlawfully assessed the volume and impact of Brazilian imports cumulatively with those from Korea and Taiwan because imports from each country under investigation must be found to have a separate causal link to the material injury suffered by the pertinent U.S. industry before they can be assessed cumulatively. This argument is based on the assumption that the cumulation provision in the statutory definition of material injury is limited by the basic causation provision of the Tariff Act of 1930 which directs the ITC to determine whether "an industry in the United States is materially injured by reason of imports of the merchandise with respect to which the administering authority had made an affirmative determination of dumping. This reasoning has more than once been discredited by this Court as "circular reasoning", most recently in *USX Corp.* v. *United States*, 11 CIT ——, 635 F. Supp. 487 (1987).

The "contributing effect" test espoused by plaintiffs in this action was appropriate under discretionary cumulation. However, the contributing effect test was held to be improperly applied "when it creates a process of circular reasoning that renders cumulation a vestigial part of the causation analysis." *USX Corp., supra.*

If the above were not sufficiently decisive, the government's position gains added weight from the legislative history, which specifically indicates that a requirement in the bill as introduced that imports from each country have a "contributing effect" in causing material injury was eliminated. H.R. Rep. No. 725, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5164. It is also noteworthy that the dissenting views of certain members of the House Ways and Means Committee speak of the amendment as one "that would require cumulation of imports * * * regardless of the contributory effect * * *" and object to the amendment on the ground that it would create "a false injury by lumping imports together regardless of whether there is any indication imports from a particular country are contributing to the injury * * *." H.R. Rep. No. 725, 98th Cong. 2d Sess. 94, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5188.

In sum, in the opinion of the Court, the language of the cumulation provision authorizes the action the ITC in this investigation, presents no conflict with other provisions of the law, and is in harmony with the intention of Congress. See, *USX Corp.* v. *United States*, 11 CIT ——, 655 F. Supp. 487 (1987).

Plaintiffs also claim that the GATT Antidumping Code requires a separate finding of causation with respect to each country under investigation and that the practice of cumulation by the ITC violates that provision. Article VI of the GATT provides that dumping duties must not be imposed on dumped imports from "another contracting party unless it determines that the effect of the dumping

or subsidization * * * is such as to cause or threaten material injury to an established domestic industry * * *." General Agreement on Tariffs and Trade (GATT), art. VI, par. 5, *opened for signature* Oct. 30, 1947, 61 Stat. All, A24, T.I.A.S. No. 1700. Article I of the GATT Antidumping Code provides that "[t]he imposition of antidumping duty is a measure to be taken only under the circumstances provided for in article VI of the General Agreement." Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Antidumping Code), June 30, 1967, 19 U.S.T. 4348, 4349, T.I.A.S. No. 6431.

The Court is not persuaded that there is a conflict between the actions of the ITC and the GATT Antidumping Code. In the opinion of the Court, such a conflict would arise only if there was no rational basis for inferring that imports from a particular country were participating in causing injury to a domestic industry. While the operation of the cumulation provision does not involve a specific causation finding with respect to each country, it does sufficiently implicate the product of each country in the general pattern of activity which is causing injury. This may test the limits of conformity to the Code but it does not constitute a clear violation of the Code. It must also be stated that even if we were to reach the conclusion that the operation of the cumulation provision violated the GATT Code, we would be bound to give primacy to the law of the United States in accordance with the direction in 19 U.S.C. § 2504(a) (1982).

Plaintiffs also state an objection to the ITC's action on constitutional grounds apparently because the statute allegedly does not provide consistent standards for enforcement of the law and therefore is a violation of due process of law. The Court is not persuaded that the operation of the cumulation provision raises a due process issue. The conditions upon which cumulation depend are clearly set out in the law and once the merchandise from any country is lawfully joined into the corpus of merchandise being subjected to a determination of injury, the constitutional right of due process of law is satisfied.

Plaintiffs final argument is that substantial evidence from the record does not support the ITC's decision that imports from Brazil were competing with imports from Korea and Taiwan as well as the domestic-like product. The Court's examination of the record shows that there was sufficient evidence to support this conclusion in the form of marketing data from large purchasers of the product, testimony at the hearing, advertisements, and other material which tended to show that there was competition between the imports from Brazil, Korea and Taiwan in the residential construction and commercial/industrial end-user markets. In sum, it was reasonable to find that there was sufficient evidence of overlap in the end-use market which, given the fungibility and similar quality of the imports, the similar channels of distribution, the similar time period involved, and the geographic overlap of the markets, justified a con-

clusion that the imports from Brazil competed with imports from Korea and Taiwan and the domestic-like product within the meaning of the cumulation provision.

For the reasons given above, the final determinations of the ITA and the ITC are affirmed, plaintiffs' motion for judgment on the agency record is denied in all respects, and the complaint is dismissed.

(Slip Op. 88–4)

WASHINGTON INTERNATIONAL INSURANCE CO., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 81–12–01678

Before RE, *Chief Judge;* WATSON and AQUILINO, *Judges.*

OPINION

[Defendant's motion to strike plaintiff's demand for jury trial denied. Chief Judge Re dissents.]

(Dated January 12, 1988)

Wayne Jarvis, Ltd. (Wayne Jarvis) and *Tribbler & Marwedel (Paul McCambridge)* for the plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division (*J. Kevin Horgan*) and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*Nancy E. Reich*) for the defendant.

Andrew P. Vance, Michael A. Johnson, Mark Neville, Jr., Norman Schwartz and *Sidney N. Weiss* for The Customs and International Trade Bar Association, *amicus curiae.*

AQUILINO, *Judge:* Defendant's motion to strike plaintiff's demand for trial of this action by jury has raised issues of uncommon importance, the decision of which, as the Chief Judge pointed out in his memorandum opinion of April 2, 1987, will have "broad or significant implications in the administration or interpretation of customs laws", 11 CIT ——, 659 F.Supp. 235, 238.

BACKGROUND

The pleadings and pretrial papers indicate purchase in Cyprus of some 64 metric tons of cheese for $160,000. This merchandise was delivered to Greece, where it was loaded on a ship for the United States in refrigerated containers. The cargo was landed at Baltimore and transferred to Chicago under an immediate delivery permit. Upon arrival there, the importer suspected that the cheese was in a "deteriorated condition unsuitable for sale to consumers", to quote from the complaint, and so notified the marine underwriters

of the shipment, who disposed of the merchandise on an "as is, where is" basis for $7,406.08.

The importer had entered the merchandise as pecorino, duty-free under item A117.67, TSUS. However, the Customs Service tested the cheese and concluded that it derived from cow's rather than sheep's milk. As such, it was classifiable under TSUS item 117.85 at a rate of duty of 10 percent *ad valorem*. Customs appraised and liquidated the merchandise on the basis of an export value of $160,000.

As the importer's surety, Washington International Insurance Co. paid the liquidated duties and protested the Service's appraisal.[1] The District Director denied the protest, whereupon this action was commenced.

Plaintiff's complaint alleges, in the alternative, that the cheese should have been appraised at the salvage bid of $7,406.08 or that it should have been entered as damaged merchandise in the same value. The complaint also demands a jury trial.

The defendant interposed a motion to strike the jury demand. The plaintiff countered with a motion to have the issue resolved by a court of three judges pursuant to 28 U.S.C. § 255 and CIT Rule 77(d)(2) (1986). Plaintiff's motion was granted by the Chief Judge in his memorandum opinion, 11 CIT ——, 659 F.Supp. 235 (1987).

Both sides, as well as attorneys for the Customs and International Trade Bar Association, as *amicus curiae*, have thoroughly briefed the questions raised by defendant's motion to strike, and oral argument has been heard.

I

In support of its motion, the government argues that neither an act of Congress nor the Constitution supports trial of this action to a jury. As to the first point, the plaintiff relies on the Customs Courts Act of 1980 provision for jury trials in the Court of International Trade, 28 U.S.C. § 1876. That statute, however, does not specify either which kinds of actions are entitled to such a trial or which kinds are not, rather what procedures are to be followed for any jury.

At a minimum, the parties and the *amicus curiae* are in agreement that actions brought by the United States to recover penalties pursuant to section 592 of the Tariff Act are triable to a jury.[2] There is support for this viewpoint in practice prior to 1980[3] as well as in the legislative history of the 1980 act[4] and in subsequent practice of this Court. *See, e.g., United States* v. *Priority Products, Inc.*, 9 CIT 392, 615 F.Supp. 593 (1985). However, even if this were not

[1] Defendant's proposed pretrial order indicates that the plaintiff has abandoned the question of the kind of milk from which the cheese derived.

[2] *See, e.g.*, Memorandum in Support of Defendant's Motion to Strike Plaintiff's Demand for a Jury Trial [hereinafter cited as "Defendant's Memorandum"], p. 8; Brief of Amicus Curiae, p. 36. *See also* Plaintiff's Opposition to Motion to Strike Demand for Jury Trial [hereinafter cited as "Plaintiff's Brief"], p. 20.

[3] *See, e.g., United States* v. *Santini*, 266 F.303 (2d Cir. 1920) (Tariff Act of 1913); *Jen Dao Chen* v. *United States*, 395 F.2d 939 (9th Cir. 1967) (Tariff Act of 1930).

[4] *See, e.g.*, H.R.Rep. No. 1235, 96th Cong., 2d Sess. 34 (1980); S.Rep. No. 466, 96th Cong., 1st Sess. 12 (1979).

true, the Supreme Court has held in *Tull* v. *United States*, 107 S.Ct. 1831 (1987), that actions brought by the government to determine liability for civil penalties are triable to a jury. Unlike the Customs Courts Act, the statute underlying that case, the Clean Water Act of 1977, 33 U.S.C. § 1251 *et seq.*, was silent on the right to a jury.

The plaintiff here urges us to accept the premise that the 1980 statute provides a "comprehensive right of trial by jury". Plaintiff's Brief, p. 10. Its written and oral presentations emphasize the legislative history of enactment of section 1876, *e.g.*, the testimony in 1980 of defendant's lead counsel herein, to wit:

> Mr. Cohen. I think you have to make a judgment first as to whether or not this court is going to be empowered to hold jury trials. If it is not, then I think all jury trial cases should be transferred to the district court. If it is to be empowered to conduct jury trials, it should conduct jury trials on all types of cases.[5]

The definitive congressional report itself refers to the fact that the act "creates a comprehensive system of judicial review of civil actions arising from import transactions" to "ensure greater efficiency in judicial resources and uniformity in the judicial decisionmaking process." H.R. Rep. No. 1235, 96th Cong., 2d Sess. 20 (1980).

Whatever the import of such statements in regard to the enactment of section 1876, it is clear that Congress has consented to suit in an action like this in 18 U.S.C. § 1581(a) and § 2631(a) and that trial by jury is deeply embedded in the jurisprudence of the United States. *See* Point II, *infra*. Indeed, as indicated above, the Supreme Court has determined that the right to such a trial exists for recent, statutory actions brought by the government. On the other hand, in an action against the government based on a 1974 amendment of the Age Discrimination in Employment Act, the Supreme Court noted the absence of an express grant of trial by jury and pointed out that a statutory right thereto exists "only where Congress has affirmatively and unambiguously granted that right". *Lehman* v. *Nakshian*, 453 U.S. 156, 168 (1981). If this is the standard for analysis of a statute, the Customs Courts Act of 1980 does not meet it.

II

The plaintiff also relies, of course, on Amendment VII to the Constitution which provides that in "Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved".[6] The Supreme Court has concluded that, "by referring to the 'common law,' the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law". *Colgrove* v. *Bat-*

[5] *Customs Courts Act of 1980: Hearing on H.R. 6394 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 76 (1980).

[6] In addition, the plaintiff cites CIT Rule 38(a), which provides that the "right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." *See also* Federal Rule of Civil Procedure 38(a), 28 U.S.C. (1987).

tin, 413 U.S. 149, 155 (1973) (emphasis in original). *See also Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n,* 430 U.S. 442, 459 (1977).

The reports of both English and American lawsuits are replete with customs cases, many decided by juries, before and after adoption of the Seventh Amendment in 1791. Indeed, the government and the *amicus curiae* both admit the existence of jury trials of cases involving customs at common law. *See, e.g.,* remarks of defendant's counsel on July 31, 1987, Tr. pp. 6–7; Defendant's Supplemental Memorandum, pp. 12, 14; and Brief of Amicus Curiae, p. 5 and p. 10 as follows:

> The early history of customs cases reveals that such cases were tried at common law before a jury. The defendant was an individual—in the United States, usually the Collector of Customs.
>
> * * * * * * *
>
> Under the British Crown and in America prior to 1791, an individual's right at common law to sue a customs officer for recovery for the wrongful seizure of goods was well established. Jury trials appear to have been fairly common.

Nevertheless, each argues against trial of this action to a jury, the defendant essentially based on its perception of the prerogatives of Congress, whereas the *amicus curiae* concludes from its review of history that there were essentially no jury trials in appraisement, as opposed to classification, cases up until the Customs Administrative Act of 1890, 26 Stat. 131, which then removed them from trial courts altogether.

Neither viewpoint warrants grant of the motion to strike plaintiff's jury demand.

A

The test as to whether a party such as the plaintiff is entitled to trial by jury is whether such a right existed in England prior to the time the Seventh Amendment was adopted. *See United States* v. *Wonson,* 28 F.Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750); *Parsons* v. *Bedford,* 28 U.S. (3 Pet.) 433, 446–47 (1830); *Capital Traction Co.* v. *Hof,* 174 U.S. 1, 22–23 (1899); *Slocum* v. *New York Life Insurance Co.,* 228 U.S. 364, 377 (1913); *Baltimore & Carolina Line, Inc.* v. *Redman,* 295 U.S. 654, 657 (1935); *Damsky* v. *Zavatt,* 289 F.2d 46 (2d Cir. 1961); *Goar* v. *Campania Peruana de Vapores,* 688 F.2d 417, 424 (5th Cir. 1982).

By that time, it was well-established that the right to sue to recover excess duties existed in England. For example, in *Campbell* v. *Hall,* 98 Eng.Rep. 848 (1774), an exporter brought an action in trespass on the case against a customhouse officer who had imposed certain duties on sugar exported from Grenada, a British colony. Based upon the findings set forth in a special verdict returned by the jury for the plaintiff, the court determined that the "impost of

four and one half percent" had been unlawfully exacted, as conflicting proclamations issued by the king had negated any such authority. It was held in *Stevenson* v. *Mortimer*, 98 Eng.Rep. 1372 (1778), that shipowners could bring an action in assumpsit for money had and received against a customhouse officer to recover excess duties which had been collected from the ship's master. In *Greenway* v. *Hurd*, 100, Eng.Rep. 1171 (1792), the trial judge had nonsuited the plaintiff's action in assumpsit against a collector of duties no longer in effect at the time of payment. While affirming the nonsuit on the ground of inadequate notice to the defendant collector, who had already submitted the payment to his superior, the King's Bench indicated that the plaintiff was not without a remedy at law—against the person in possession of the unlawful collection.

In short, customs actions in England were at law and thus triable to a jury.

B

The implication of the fine *amicus* brief is that customs cases involving appraisement issues were not, as a rule, triable in court or to juries during the time of the adoption of the Seventh Amendment and thereafter in the United States. There are, however, reports of sufficient such cases to indicate that this was not necessarily the rule.

1. *Damage Issues*

One of the appraisement issues that could be contested in court was whether goods were damaged prior to their importation, an issue which is presented by this action. For example, *Wight* v. *Curtis*, 29 F.Cas. 1170 (C.C.S.D.N.Y. 1845) (No. 17,628), which was tried before a jury, involved questions as to the extent of the damage done and whether the importer was required to produce a certificate of the port wardens before an appraisement and a deduction for that damage could be claimed. The case involved cargo on a ship which "grounded in a heavy wind, and filled and sunk" upon arrival at New York. The vessel was subsequently raised and towed into the city, and its cargo was off-loaded and, by consent of the parties, "ordered by the collector to be deposited in a public store-house". *Id.* The merchandise had been damaged by seawater to the extent of 60 percent of value. The plaintiffs produced certificates of the port wardens on all of their packages, except one, and the collector allowed an appraisement of the damage to those packages. At issue in the case was the question of the appraisement of the remaining package. The plaintiffs had offered the collector a sworn survey and appraisement conducted by an individual[7] who certified that he found the goods "to have been damaged on the voyage of importa-

[7] The opinion is unclear as to the precise title of this person. The court indicated that he "represent[ed] himself to be a person 'selected by the parties interested, to survey, appraise, arbitrate, and judge of vessels and goods arriving damaged, or becoming damaged in the port of New York' ". 29 F.Cas. at 1170. There is also some indication that he may have been a marine surveyor appointed by the chamber of commerce and board of underwriters of the port of New York. *See id.* at 1171.

tion". *Id.* They also produced a deposition of the ship's master proving the injury to the cargo.

The court determined that this evidence as to damages was admissible. While noting that the collector in his argument had made some criticism as to the nature of the proof of damage and its sufficiency, the court determined that "the objection in the trial referred essentially to their admissibility" and, since the "fact and extent of damage was not made a prominent point", the court regarded "the testimony * * * sufficient to have justified the jury in finding for the plaintiffs". *Id.* at 1171. After examining the pertinent statutes, the court determined that certification by the port wardens was not required. Therefore, the plaintiffs were entitled to judgment on their verdict. *See id.* at 1174.

The issues in the action at bar are similar to those resolved in *Wight.* As indicated above, the defendant disputes plaintiff's claim that the cheese was damaged prior to its importation. In addition, the defandant contends that, since the plaintiff failed to inform it of the impairment of the perishable product within 96 hours of unloading, the judicial relief requested cannot lie. These issues are close to the questions in *Wight* concerning the proof of damages and the failure to notify appropriate officials. Thus, a position that issues of the kind raised herein were not tried in a court of law before a jury[8] is not well-grounded.

2. *Waste Issues*

Questions involving leakage and waste could also be resolved by a jury. *Lawrence* v. *Caswell,* 54 U.S. (13 How.) 488 (1851), was a suit against a collector of customs to recover duties paid under protest on imported brandy that had leaked during shipment. Tried before a jury in the Circuit Court for the Southern District of New York, the plaintiff contended that duties had been assessed based on the quantity stated in the invoices and not the actual amount imported, as ascertained by gaugers, thus failing to account for the leakage. Additionally, the plaintiff claimed entitlement to a statutory deduction for leakage, as that allowance is made for waste occurring after the liquor has arrived but prior to its sale.

The trial judge, agreeing with this interpretation of the law, charged the jury accordingly, and it found for the plaintiff. The Supreme Court, while reversing on the statutory deduction issue on the ground that it had no application to an *ad valorem* duty, explained that judicial review was available because "the duty demanded was paid under protest, stating specially the ground of objection." 54 U.S. at 496.

Marriott v. *Brune,* 50 U.S. (9 How.) 619 (1850), similarly was an action in assumpsit brought against the collector of the port of Baltimore to recover excess duties paid under protest upon importations of sugar and molasses. The collector had assessed duties based

[8] *See, e.g.,* Defendant's Supplemental Memorandum, pp. 12 and 16-17; Brief of Amicus Curiae, pp. 10-11 and 37.

on the quantities specified in invoices. The quantities which arrived and were entered, however, were less than those shipped, due to damage and waste. The importers' contention that duty should be paid only on amounts entered was upheld by the Circuit Court for the District of Maryland, although the holding applies only to duties that had not been finally assessed by the collector because the importers' protest was found to be insufficient.

The Supreme Court affirmed that decision, concluding "that revenue should be collected only from the quantity or weight which arrives here. That is, what is *imported*". 50 U.S. at 632 (emphasis in original). The Court compared the loss of the sugar to loss of merchandise by perils of the sea, fire or natural decay. *See id.* at 634.

As to the finality of the appraisers' estimate, the Court stated "it could be final only as to the price of the sugar abroad, and not as to the quantity or weight reaching this country. The latter is fixed by another class of officers, authorized by law for that purpose; and if the appraisers undertake to fix it, their action in that respect is *coram non judice,* and a nullity." *Id.* at 634.

While *Marriott* was apparently tried on an agreed statement of facts before a judge, it was brought in assumpsit (as were classification cases), and therefore could have been tried to a jury. In fact, *Marriott's* companion case before the Supreme Court, involving the same question as to whether an allowance should be made for leakage and drainage, was tried before a jury. *See United States* v. *Southmayd,* 50 U.S. (9 How.) 637, 638 (1850). That action, however, was postured differently, as the government had brought it to recover unpaid duties. The Court affirmed the decision below in favor of the importer.

Other cases involving waste issues included *Austin* v. *Peaslee,* 2 F.Cas. 235 (C.C.D.Mass. 1857) (No. 666), where hemp imported from Manila had "lost weight during the voyage", and *Schuchardt* v. *Lawrence,* 21 F.Cas. 747 (C.C.S.D.N.Y. 1856) (No. 12,484), where gin "had leaked out of the casks during the voyage." Based on the courts' application of *Marriott* and *Lawrence* v. *Caswell,* the plaintiff importers prevailed on claims that their goods had been appraised on the basis of invoice quantity as opposed to the amount actually landed, thus allowing them to recover the excess of duties exacted by the defendant collectors.

Leakage disputes bear similarity to damage claims, as both involve a reduction in the value of the merchandise prior to arrival. *See Marriott,* 50 U.S. at 634. While the former entail a loss in quantity, the latter involve a reduction in quality.

3. *Timing-of-Valuation Issues*

An importer could bring an action to contest the date used by an appraiser to determine foreign-market value. *E.g., Maxwell* v. *Griswold,* 51 U.S. (10 How.) 242 (1850), and *Greely* v. *Thompson,* 51 U.S. (10 How.) 225 (1850). In each case, this question was subjected to the

review of both a judge and jury. *Maxwell* involved an importation of sugar and hemp from Manila. The goods had been purchased in March and April 1849 but were not shipped until July 24th of that year. Their value had appreciated during this period, and the importers protested the decision to appraise the goods on the basis of their market value as of the day of shipment. The jury returned a verdict for the importers, and the Supreme Court affirmed the judgment.

Likewise, the companion case, *Greely,* involved an assumpsit action tried before a jury seeking to recover excess duties that had been exacted by a collector. The importers had purchased railway iron and made it ready for shipment on January 24, 1849. However, loading was completed a month later, during which period the value of the iron had increased. The collector determined the duties based on the increased value of the goods, but the Court affirmed a judgment that January 24th was the appropriate point of reference for appraisement purposes.[9]

Maillard v. *Lawrence,* 16 F.Cas. 501 (C.C.S.D.N.Y. 1855) (No. 8,972), in which a jury found for the plaintiff, subject to the court's opinion, also involved a situation where value had increased greatly between time of purchase and time of importation. The evidence presented to the jury at trial established that the goods had been appraised in accordance with instructions of the Secretary of the Treasury, at the time of exportation rather than of purchase. While the defendant agreed that the earlier value should have been used, it contended that the protest was insufficient. The court disagreed, thus entitling importers to recover excess duties paid. *See also Morlot* v. *Lawrence,* 17 F.Cas. 772 (C.C.S.D.N.Y. 1853) (No. 9,816).

4. *Foreign Currency Issues*

During the 19th century, an importer could bring an action in court to contest appraisement based on the valuation of a foreign currency. For example, in *Heinemann* v. *Arthur's Executors,* 120 U.S. 82 (1887), the collector had valued Russian wool at an amount higher than that reflected on the importer's invoice, based upon the worth of rubles in U.S. currency. A jury was presented with the facts surrounding the purchase of the merchandise in Russia, its date of exportation and how its value should have been assessed based on the ruble, but the trial judge directed a verdict for the defendant based on his interpretation of the statute. The Supreme Court affirmed.

In *Alsop* v. *Maxwell,* 1 F.Cas. 573 (C.C.S.D.N.Y. 1853) (No. 263), the importer proved to a jury that the currency in question had been debased or depreciated. The collector was therefore found to

[9] *Greely* also involved the removal and replacement of one of the merchant appraisers who wanted to obtain more evidence that might justify the lower estimate. The Court agreed with the trial judge's instruction to the jury that the appraisal was invalid because of this irregular conduct.

The defendant attempts at page 14 of its supplemental brief to make it seem as if such suits were only "permitted when there was fraud upon the part of the appraisers, or some irregularity in the selection of the appraiser", but *Greely,* as well as other cases discussed above, involved issues related to the action at bar.

owe the excess duties that had been paid. The same result was reached in *Alsop* v. *Maxwell,* 1 F.Cas. 574 (C.C.S.D.N.Y. 1856) (No. 264), another case involving a dispute as to the value of a foreign currency. While the court in *Roosevelt* v. *Maxwell,* 20 F.Cas. 1155 (C.C.S.D.N.Y. 1856) (No. 12,034), primarily examined the classification of glass from Germany, it also determined that the valuation of the merchandise was in error based on the collector's incorrect determination of its worth in U.S. currency. Judgment was entered for the importers for the excess of duties they had been required to pay as a result of that error.

5. *Commissions*

Another issue raised in valuation cases was the amount for a commission added to an appraisement by a collector. In *Munsell* v. *Maxwell,* 17 F.Cas. 999 (C.C.S.D.N.Y. 1855) (No. 9,932), a jury, presented with evidence as to the appropriate value of commissions on goods from China, found the duties exacted to be beyond the usual rate. Accordingly, judgment was entered on the verdict for the plaintiff, subject to the opinion of the court. Likewise, the plaintiff in *Riess* v. *Redfield,* 20 F.Cas. 774 (C.C.S.D.N.Y. 1859) (No. 11,821), prevailed on his claim that the commissions added to the value of the goods were excessive. The importer in *Norcross* v. *Greely,* 18 F.Cas. 301 (C.C.D.Mass. 1852) (No. 10,294), brought an action, tried before a jury, in which he alleged that he should not have been charged for a commission, since none had been paid. He thereafter elected to discontinue the case.

6. *Freight Issues*

Often, importers would claim that valuation improperly included freight charges. This occurred, for example, in *Wilbur* v. *Lawrence,* 29 F.Cas. 1188 (C.C.S.D.N.Y. 1851) (No. 17,635), where a jury returned a verdict for the plaintiff, subject to the court's decision. The court held that transportation costs incurred because of a blockade had been improperly included in appraising the value of the goods. Similarly, in *Gant* v. *Peaslee,* 9 F.Cas. 1143 (C.C.D.Mass. 1855) (No. 5,212), the court directed a verdict for the plaintiff, finding that charges added to the appraised value of the goods for their passage to an intermediate port before reaching the United States were nevertheless "freight, and * * * not to be included as a dutiable charge". *Id.* at 1145. The same conclusion was reached by the court in *Bernard* v. *Morton,* 2 F.Cas. 840 (C.C.D.Mass. 1850) (No. 1,006), as it related to freight incurred to the intermediate port of Halifax. *See also Warren* v. *Peaslee,* 29 F.Cas. 280 (C.C.D.Mass. 1855) (No. 17,198) (inland freight properly added to appraised value); *Millar* v. *Millar,* 17 F.Cas. 289 (C.C.D.Mass. 1855) (No. 9,546) (where a judge directed a verdict for the importer to recover freight incurred on one leg of a voyage added on by the collector as dutiable charges but found that other charges were properly added to market value); *Bliss* v. *Redfield,* 3 F.Cas. 714 (C.C.S.D.N.Y. 1860) (No. 1,549) (where

the importer prevailed on his claim that the appraisers had improperly added freight to the valuation of the merchandise).

7. *Packaging Issues*

Another issue raised in suits against collectors was the appropriateness of adding the cost of packaging to the value of the merchandise. In *Badger* v. *A. Cusimano & Co.*, 130 U.S. 39 (1889), the Court not only affirmed the trial judge's decision that the collector had improperly added to the invoice value certain charges relating to its packaging, but also affirmatively stated that this question was subject to judicial review. While the jury in *Wilson* v. *Maxwell*, 30 F.Cas. 147 (C.C.S.D.N.Y. 1851), (No. 17,824), returned a verdict for the importer, subject to the opinion of the court, the trial judge found that the appraisers had properly included the actual weight of boxes of soap, less a fixed rate for tare. The court did allow the importer to recover the additional duties that had been paid as a penalty for undervaluation because of the misinterpretation of the statute. *See also Cobb* v. *Hamlin*, 5 F.Cas. 1129 (C.C.D.Mass. 1868) (No. 2,922); *Saxonville Mills* v. *Russell*, 21 F.Cas. 595 (C.C.D.Mass. 1870) (No. 12,413).

8. *Fraud*

Another area subject to trial by jury involved issues of fraud. For example, in *Lillie* v. *Redfield*, 15 F.Cas. 538 (C.C.S.D.N.Y. 1857) (No. 8,351), the trial judge upheld a jury's finding that fraud had been perpetrated on the importers. That is, the goods shipped did not conform to the contract and invoice, and the importers were thus entitled to recover excess duties paid as a result of the collector's determination to rely on the misleading invoice.

C

Little doubt exists from the foregoing cases that persons aggrieved by unlawful collections of duties possessed the right to recover them in an action at law. Indeed, one perceptive student of the history of such actions in the 19th century, Judge George S. Brown of the Customs Court, commented:

> The original common law remedy for the recovery of taxes illegally collected was so broad and all inclusive upon both questions of fact as well as questions of law that to give a narrower, less inclusive construction to the present statutory remedies would seem to be inadmissible as in degradation of the common law.[10]

This comment was written in regard to the dissenting opinion of Justice Story in *Cary* v. *Curtis*, 44 U.S. (3 How.) 236 (1845), the outcome of which led to an immediate congressional declaration that

[10] Brown, *A Dissenting Opinion of Mr. Justice Story Enacted as Law Within Thirty-Six Days*, 26 Va.L.Rev. 759, 767 (1940). *See also Michelin Tire Corp.* v. *United States*, 82 Cust.Ct. 308, 323–28, C.R.D. 79–6, 469 F.Supp. 270, 282–86 (1979) (Watson, J.).

nothing in earlier legislation requiring duties to be remitted to the Treasury as soon as collected[11]

> shall take away, or be construed to take away or impair, the right of any person or persons who have paid or shall hereafter pay money, as and for duties, under protest, to any collector of customs, or other person acting as such, in order to obtain goods, wares, or merchandise imported by him or them, or on his or their account, which duties are not authorized or payable in part or in whole by law, to maintain any action at law against such collector, or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury, touching the same, according to the due course of law.[12]

In other words, Congress overruled *Cary*.

The defendant herein disagrees with this analysis, citing *Arnson* v. *Murphy*, 109 U.S. 238 (1883), and *Nichols* v. *United States*, 74 U.S. (7 Wall.) 122 (1869). Those cases, however, stand simply for congressional authority to require a written protest as a condition precedent for suit and to prescribe (and thereby preempt a state) period of limitation for commencement thereof. Neither the 1845 act underlying *Nichols* nor the Act of June 30, 1864, 13 Stat. 214, involved in *Arnson* reflected attempts by Congress to restrict the right to trial by jury. Indeed, not only did the earlier statute provide for such right as quoted above, but the later law continued this right, recited with approval by the Court in *Arnson*,[13] as section 3011 of the Revised Statutes as follows:

> Any person who shall have made payment, under protest and in order to obtain possession of merchandise imported for him, to any collector or person acting as collector of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover

[11] *See* Act of March 3, 1839, ch. 82, § 2, 5 Stat. 339, 348–49. This enactment can be attributed, in part, to the decision in *Elliot* v. *Swartwout*, 35 U.S. (10 Pet.) 137 (1836), which held that, if a collector of customs turned over duties to the Treasury with knowledge that they were disputed by the importer, the collector remained liable in an action of assumpsit. The holding derived from the common law governing agents and principals, particularly reasoning from English cases that if an agent were paid money by mistake and apprised by the mistake before paying it over to his principal, he was personally liable. This rule resulted in collectors' withholding large sums of money paid to them as duties which increased the danger of defalcations and represented a delay in the efficient receipt of revenues by the government. In response, the Act of March 3, 1839 required that all money paid to a collector under protest be turned over promptly to the Treasury and the Secretary would refund any excess duties.

Carey v. *Curtis*, 44 U.S. (3 How.) 236 (1845), held that, by requiring collectors to pay over duties immediately to the Treasury, section 2 had removed the agency rationale for the personal, common-law liability that had existed. That is, "the action for money had and received * * * was barred by the Act of Congress of 1839." *Id.* at 252.

[12] Declaratory Act of Feb. 26, 1845, ch. 22, 5 Stat. 727.

[13] *See* 109 U.S. at 241. In *Arnson*, an importer had complied with the requirement that he take an appeal to the Secretary of the Treasury, but no decision issued. The importer brought suit more than seven years later, but it was dismissed by the lower court because it did not meet New York State's six-year statute of limitations for actions upon implied obligations. The Supreme Court held, in effect, that the action was premature; it was not governed by the state statute, and the time for a suit after an adverse decision of the Secretary had not yet started to run. The Court reasoned:

> From this review of the legislation and judicial history of the subject, it is apparent that the common-law action recognized as appropriate by the decision in *Elliott* v. *Swartwout*, 10 Peters, 137, has been converted into an action based entirely on a different principle—that of a statutory liability, instead of an implied promise—which, if not originated by the Act of Congress, yet is regulated, as to all its incidents, by express statutory provisions. And among them are the conditions which fix the time when the suit may begin, and prescribe the period at the end of which the right to sue shall cease. Congress having undertaken to regulate the whole subject, its legislation is necessarily exclusive. 109 U.S. at 243.

The Court does not suggest from this that, by "converting" the common-law action into one governed by statute, Congress dispensed with the constitutional right to trial by jury in these actions.

> back any excess so paid. But no recovery shall be allowed in such action unless a protest and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty one.

While the government concedes, as indicated above, that "an importer could, at one time, obtain a jury trial in an action contesting classification of imported merchandise",[14] it argues that the rule in appraisement cases was quite different, relying on *Hilton* v. *Merritt*, 110 U.S. 97 (1884), and *Auffmordt* v. *Hedden*, 137 U.S. 310 (1890).[15]

Hilton v. *Merritt* involved a dispute as to the appraisement of kid gloves imported from France. The case was tried to a jury, which returned a verdict for the collector at the direction of the trial judge. The dispute centered on the value of the gloves. A merchant appraiser had agreed with the importers that the invoice value was correct, while the general appraiser determined the gloves to be worth more. The collector chose to adopt the value contained in the latter's amended report.

In their appeal, the plaintiffs claimed a right to go to the jury on several issues, including whether a full and fair examination of the goods had occurred; whether the invoice reflected the actual value of the goods; and whether the facts in the protest had been established by the evidence. *See* 110 U.S. at 101. After examining the pertinent statutes, the Court concluded that Congress intended that the appraisement of the customs officers should be final, "but all other questions relating to the rate and amount of duties may * * * be reviewed in an action at law to recover duties unlawfully exacted."[16]

The other case relied on by the defendant herein, *Auffmordt* v. *Hedden*, was an appeal by importers from a jury verdict after trial in their favor. They challenged evidentiary rulings of the trial judge regarding appraisal of their merchandise which they claimed minimized their recovery by $42. The Supreme Court sustained the rulings, including those based on a statutory provision that, once a collector decided between any differing viewpoints upon reappraisement, that determination was to be final.

Badger v. *A. Cusimano & Co.*, 130 U.S. 39 (1889), one of the cases referred to in *Auffmordt*, involved the importation of Valencia oranges. After appraisal, the collector had increased the invoice value of the fruit while reducing by an equal amount the invoiced charges for packing and freight, which were not dutiable, and the importer protested. The case was tried pursuant to a stipulation between the parties waiving a jury. Judgment for the plaintiff was affirmed by the Supreme Court upon a rationale that there was

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[14] Defendant's Supplemental Memorandum, p. 12, citing as examples *United States* v. *Kid & Watson*, 8 U.S. (4 Cranch) 1 (1807), and *Merritt* v. *Tiffany*, 132 U.S. 167 (1889). *See also Pickhardt* v. *Merritt*, 132 U.S. 252 (1889), and *Greenleaf* v. *Goodrich*, 101 U.S. 278 (1880) (jury charge in actions to recover excess duties in classification cases held not in error).

[15] It is to be noted in passing that the Customs Courts Act of 1970, 84 Stat. 274, eliminated any differential judicial treatment for classification and appraisement issues.

[16] 110 U.S. at 106. The Court upheld the trial judge's decision not to charge the jury on the issue of full and fair examination, apparently because of a lack of evidence on this claim. *See id.* at 107.

> no impeachment of the appraisement, so far as it states the value of the charges or the value of the goods as increased by the amount of the reduction made from the value of the charges. The only inquiry is, whether the collector acted within the power conferred upon him by statute when he required the importers to pay duties not only upon the actual market value of the goods, but upon such additional value as was equal to the reduction made from the value of the cases covering the goods. These are questions of law simply, involving the power of the collector under the statute. They are entirely apart from any inquiry as to fraud in the appraisement, or as to the values set forth in it, and may be raised by the importer in an action at law, when he has taken such steps as entitle him to bring suit for the recovery of duties illegally exacted from him. This ruling is entirely consistent with the decision in *Hilton* v. *Merritt*. 130 U.S. at 43.

McCall v. *Lawrence*, 15 F.Cas. 1234 (C.C.S.D.N.Y. 1855) (No. 8,672), took a similar approach that appraisements are nonreviewable, but pointed out that Treasury instructions to collectors with regard to valuations were not conclusive upon the courts.

In their brief, counsel for the *amicus curiae* claim that "[w]ith the exception of the report of a jury finding of value in *Rankin* v. *Hoyt*, 45 U.S. (4 How.) 327 (1846) * * * we have not found a reported case of merchandise having been tried to a jury after the Act of March 2, 1799". Amicus Brief, pp. 10–11. In that case, the trial judge found for the collector despite a jury's finding that the imported wool was only worth seven and one-half cents per pound and a statute dictating that unmanufactured wool with a value not exceeding eight cents per pound be imported duty free. The plaintiffs argued that they were entitled to judgment on the basis of the jury's special verdict and that, since the appraiser was not authorized to appraise the value of goods in order to determine whether they were dutiable, his appraisement was a nullity.

The Court disagreed, concluding that the statute permitted the use of the appraiser and that the collector was not precluded by the jury finding from following the higher valuation of the appraiser. The *amicus* places emphasis herein on a statement by the Court that

> an appraisal, made in a proper case, must be followed, or the action of the appraisers would be nugatory, and their appointment and expenses become unnecessary. *Tappan* v. *The United States*, 2 Mason, 404. The propriety of following it cannot in such case be impaired by the subsequent verdict of the jury differing from it in amount * * *. 45 U.S. at 335.

The Court in *Rankin*, while questioning a jury's duty to value merchandise, upheld the action challenging the collector's right under the law to have an appraisement conducted, and counsel now admit that "questions of whether the appraiser had acted within the parameters of the law were properly reviewable by a Court; to

the extent that such matters involved questions of fact, they were presented to a jury". Amicus Brief, p. 22, n. 4, referring to *Greely's Administrator* v. *Burgess*, 59 U.S. (18 How.) 413 (1855) (holding that the question of whether the merchant appraisers examined at least one package out of every ten packages, as required by law, was one for the jury); and *Heddin v. Iselin*, 142 U.S. 676 (1892) (holding that the question of whether the merchant appraiser was qualified was properly submitted to the jury). In other words, the correctness of the position espoused by the *amicus curiae* and the defendant, to wit, that plaintiff's jury demand should be stricken, is not shown conclusively by the cases they have brought to our attention.

D

Point II of Defendant's Memorandum correctly outlines the history to date of judicial review of customs decisions. That history shows that Congress passed the Customs Administrative Act in 1890, 26 Stat. 131, which set up the Board of General Appraisers under the Department of the Treasury to review and decide customs matters. Debate on this legislation reflects concern by some members of Congress that it denied citizens "the Constitutional right of trial by jury".[17] In fact, an earlier proposal to create a special court for the trial of customs cases had been circulated in 1881 which led the collector of Boston to state in a letter to the Secretary of the Treasury that he had "serious doubt whether such legislation would not be unconstitutional, in that it would seem to abridge the rights of the citizen to trial by jury." S.Exec.Doc. No. 48, 47th Cong., 1st Sess. 33 (1881). He noted that "[i]t would also seem to be an encroachment upon the peculiar privilege of the judiciary to finally determine the construction of the law". *Id.*

Indeed, by 1926 the Board of General Appraisers had become the United States Customs Court under Article I of the Constitution.[18] Thereafter, Congress declared that court to be established under Article III. The reports of both judiciary committees in support of the Act of July 14, 1956, ch. 589, 70 Stat. 532, recognized that the

> Customs Court handles cases which very properly come within the judicial power of the United States as set forth in article III, which provides that such judicial power shall extend to controversies to which the United States shall be a party. Thus, there can be no doubt that the Customs Court should be a constitutional Court.[19]

Accord, Glidden Company v. *Zdanok*, 370 U.S. 530, 575 (1962) (where the Supreme Court, in considering the status of judges of the Court of Customs and Patent Appeals, stated that customs litigation "conforms to conventional notions of case or controversy seems no longer open to doubt").

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[17] 21 Cong.Rec. 811 (Jan. 23, 1890). For a more complete view of the legislative history, see the dissent.

[18] *See* Act of May 28, 1926, ch. 411, 44 Stat. 669.

[19] H.R.Rep. No 2348, 84th Cong., 2d Sess. 1 (1956). *See* S.Rep. No. 1827, 84th Cong., 2d Sess. 2 (1956) ("The committee is of the opinion that the court more properly should have been so created, and this bill accomplishes this end").

Notwithstanding this recognition, the government's present view is that the 1890 and subsequent acts are clear reflections of the omnipotence of Congress over such litigation, which entails now, of course, statutory waiver of sovereign immunity. This position has apparently induced our brother in dissent to posit the issue, erroneously in our view, as the constitutionality of those acts. Their constitutionality under Article I is not at issue,[20] nor, for that matter, is the proposition that Congress has the power to constitute tribunals like this Court of International Trade under Article III. Otherwise, it would be appropriate to refer to *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), which held unconstitutional the provision in the Bankruptcy Act of 1978 which established "in each judicial district, as an adjunct to the district court * * * the United States Bankruptcy Court". 28 U.S.C. § 151(a) (1976 ed., Supp. IV). In rendering this landmark decision, the Court's lead opinion recognized but "three narrow situations" where "the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers."[21] Two of those exceptions, namely, "territorial courts"[22] and "the power to establish and administer courts-martial"[23], on their face, are not even arguably apposite here. The third encompasses legislative courts and administrative agencies created by Congress to adjudicate cases involving "public rights", as first referred to in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856), in the following context:

> * * * [W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

The lead opinion in *Northern Pipeline* states that this public-rights doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued. See * * * also *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929). But the * * * doctrine also draws upon the principle of separation of powers, and a historical understanding that certain pre-

[20] For example, the constitutionality of the Customs Administrative Act of 1890 was essentially disposed of soon thereafter in *Schoenfeld* v. *Hendricks*, 152 U.S. 691 (1894).
[21] 458 U.S. at 64. Two justices, while concurring in the judgment, declined to join the plurality in deciding whether there is a "general proposition and three tidy exceptions." 458 U.S. at 91 (Rehnquist, J. concurring).
[22] *See generally* 458 U.S. at 64–65 and the cases cited therein.
[23] *See generally* 458 U.S. at 66 and the cases cited therein.

> rogatives were reserved to the political Branches of Government. The doctrine extends only to matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative department," *Crowell* v. *Benson*, 258 U.S. 22, 50 (1932), and only to matters that historically could have been determined exclusively by those departments, see *Ex parte Bakelite Corp.*, *supra*, at 458. The understanding of these cases is that the Framers expected that Congress would be free to commit such matters completely to non-judicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency. *Crowell* v. *Benson*, *supra*, at 50.
>
> The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are "inherently * * * judicial." 458 U.S. at 67–68 (footnote omitted).

Whether the 1890 and subsequent acts fall within the purview of this doctrine is not entirely clear, although *Murray's Lessee* involved a challenge to the use of a distress warrant issued by the Solicitor of the Treasury against a customs collector to recover revenues withheld by him. The Supreme Court concluded that this procedure was not in conflict with either the Constitution, in particular the due process clause of Amendment V,[24] or the settled usages and modes of proceeding inherited from the common and statute law of England.

As shown above, one of those modes of proceeding was an action at law by an aggrieved private party against the collector, which action was triable to a jury. While Congress determined in its Act of March 3, 1839 to require the collector to remit immediately to the Treasury all duties collected, the essence of such actions has remained the same to this day. And since 1956, those actions have been triable in a court constituted by Congress under Article III of the Constitution. In *Northern Pipeline*, the Supreme Court held that, where this article applies, all of the legislative powers specified in Article I are subject to it.[25] Of course, the defendant does not challenge this holding herein but does not attempt to raise the shield of its sovereignty. While the nature of our government of the people, by the people and for the people makes its immunity subject to continuous debate, the role of the political branches as determin-

[24] The dissent seems to imply that compliance with this clause obviates adherence to other dictates of the Constitution or Bill of Rights. Obviously, this cannot be the case.

Furthermore, the Supreme Court's analysis in *Murray's Lessee* as to why the warrant procedure prescribed by the challenged Act of May 15, 1820 did not entail a denial of due process of law is also persuasive with regard to the contention of the plaintiff herein that trial of penalty actions to a jury under 28 U.S.C. § 1876 but not this action would be a denial of equal protection. *See* Plaintiff's Brief, p. 2, citing *Frederickson* v. *Luedtke Construction Co.*, 427 F. Supp. 1309, 1315 (W.D.Mich. 1977).

[25] 458 U.S. at 73. Apparently, Congress may not "create courts free of Art. III's requirements whenever it finds that course expedient." *Id.* The Court's lead opinion thus rejected the proposition that it

> replace the principles delineated in [its] precedents, rooted in history and the Constitution, with a rule of broad legislative discretion that could effectively eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government. *Id.* at 74 (footnote omitted).

er of the parameters thereof[26] is not open to discussion other than what the Constitution permits or prohibits.

The nature of the action at bar, as it has "emerged from its historical permutations, is still the statutory substitute for the common law action for recovery of duty".[27] When a federal statute embraces a common-law form of action,

> that action does not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in action for debt still prevails whatever modern name may be applied to the action. To hold otherwise would be *to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactments. It is by such methods that courts lose their power to enforce the Bill of Rights.*[28]

Stated another way, since the statutory action "merely codifies" a right that was "known at common law, the right to trial by jury must be preserved." Murphy, *Article III Implications for the Applicability of the Seventh Amendment to Federal Statutory Actions*, 95 Yale L.J. 1459, 1473 (1986).

E

In *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280 (1856), the Court sustained the warrant procedure in view of the nonexistence of "some other provision" in the Constitution "which restrains congress". The contention in this action is, of course, that the Seventh Amendment is such a provision.

For its part, the defendant relies on the following *dictum* in *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981):

> It has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government. In *Galloway* v. *United States*, 319 U.S. 372, 388–389, the Court observed (footnotes omitted):
>
> > "The suit is one to enforce a monetary claim against the United States. It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign. Whatever force the Amendment has therefore is derived because Congress, in the legislation cited, has made it applicable."

As indicated in Point I *supra*, the issue in *Lehman* was whether a plaintiff against the federal government under the Age Discrimination in Employment Act was entitled to a jury in the absence of any provision therefor in that statute. Since such an action clearly did not exist at common law, the Court concluded that the Seventh

[26] We note in passing that the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–11, reflects the recent intent of Congress "to incorporate into United States law the 'restrictive' theory of sovereign immunity in accordance with international law". *Amerada Hess Shipping Corp.* v. *Argentine Republic*, 830 F.2d 421, 427 (2d Cir. 1987).

[27] *Michelin Tire Corporation* v. *United States*, 82 Cust.Ct. 308, 327, C.R.D. 79–6, 469 F.Supp. 270, 285 (1979) (Watson, J.): Duties have long been supplanted by taxes as the primary source of federal revenues under Article I. Since the federal income tax, unlike customs duties, did not exist in 1791, it became necessary for Congress, ultimately, to provide the jury trials of actions against the government for recovery of that tax, 28 U.S.C. § 2402.

[28] *United States* v. *Jepson*, 90 F.Supp. 983, 986 (D.N.J. 1950) (emphasis added).

Amendment did not apply. *Galloway* involved a claim for benefits under an insurance policy issued pursuant to the War Risk Insurance Act. The trial judge had granted the government's motion for a directed verdict at the close of the plaintiff's case, and the Court of Appeals affirmed that decision. The plaintiff contended that he had presented sufficient evidence to have his case go to the jury and, thus, the directed verdict deprived him of his right to have the jury decide. On review, the Supreme Court disagreed that the plaintiff had presented sufficient evidence, and it also explained that the Seventh Amendment was inapplicable to cases that were unknown under the common law and that, in any event, trial judges can direct verdicts.

Recently, in *Tull* v. *United States,* 107 S.Ct. 1831 (1987), the purview of this amendment was discussed as follows:

> * * * The Court has construed [its] language to require a jury trial on the merits in those actions that are analogous to "Suits at common law." Prior to the Amendment's adoption, a jury trial was customary in suits brought in the English *law* courts. In contrast, those actions that are analogous to 18th-century cases tried in courts of equity or admiralty do not require a jury trial. See *Parsons* v. *Bedford,* 3 Pet. 433 (1830). This analysis applies not only to common law forms of action, but also to causes of action created by congressional enactment. See *Curtis* v. *Loether,* 415 U.S. 189, 193 (1974).
>
> To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of the remedy sought. First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. See, *e.g., Pernell* v. *Southall Realty,* 416 U.S. 363, 378 (1974); *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469, 477 (1962). Second, we examine the remedy sought and determine whether it is legal or equitable in nature. See, *e.g., Curtis* v. *Loether,* 415 U.S., at 196; *Ross* v. *Bernhard,* 396 U.S. 531, 542 (1970).[29]

If this is the proper method for analyzing the action at bar, the conclusion it leads to is the right to a jury trial, for the nature of this action has remained essentially unchanged since the 18th century. While such suits were brought at that time against the king's collector, and not against the king, that subsequent cases in this country were also originally against a collector but later against the United States as titular defendant does not change the consistent, fundamental nature of the disagreement between an importer and a local official over the assessment of merchandise for imposition of duties. From early times to date, these disagreements have been resolvable in courts of law. They have never been tried in either equity or admiralty courts. Furthermore, if, as the Court in *Tull* states, "characterizing the relief sought is '[m]ore important' than finding

[29] 107 S.Ct. at 1835 (emphasis in original, footnote omitted).

a precisely analogous common law cause of action in determining whether the Seventh Amendment guarantees a jury trial",[30] the relief sought here shows this to still be an action in debt.[31] In other words, the remedy the plaintiff seeks herein is legal, rather than equitable, in nature.

CONCLUSION

To summarize, history and the law, as recently elucidated by the Supreme Court in *Tull* v. *United States*, show that trial by jury remains a fundamental right which applies to an action such as this one, and defendant's motion to strike plaintiff's demand for a jury trial must therefore be denied.

RE, *Chief Judge*, dissenting. Fully cognizant of the importance of the right to a trial by jury, and the responsibility of the courts in preserving rights enshrined in the Constitution, I am, nevertheless, constrained to dissent. *See E.E.O.C.* v. *Corry Jamestown Corp.*, 719 F.2d 1219, 1224 (3d Cir. 1983). In sum, I disagree that there is a right to a trial by jury, under the seventh amendment to the Constitution, in an action against the United States for the recovery of customs duties.

Little need be said as to the claim that the right to trial by jury in this action if conferred by the Customs Courts Act of 1980, specifically Title 28 U.S.C. § 1876 (1982). Section 1876 is merely an enabling statute necessary because of the plenary jurisdiction acquired by the court, and the penalty cases arising under 28 U.S.C. § 1582 (1982 & Supp. II 1984) in which the United States is a plaintiff. Section 1876, therefore, simply "sets forth the necessary mechanisms for the court to conduct a jury trial." H.R. Rep. No. 1235, 96th Cong., 2d Sess. 63 (1980). It neither grants nor confirms any right to a trial by jury in cases against the United States to recover customs duties.

The discussion as to whether there is a right to a jury trial under the seventh amendment to the Constitution appropriately may begin with a reference to the general principle restated by the Supreme Court in the case of *Lehman* v. *Nakshian*, 453 U.S. 156 (1981). "It has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government." 453 U.S. at 160. Hence, when Congress waives the immunity of the United States, a plaintiff has a right to trial by jury only if Congress "has affirmatively and unambiguously granted that right by statute." *Id.* at 168.

Significantly, unlike an action for the recovery of customs duties, Congress expressly has provided, "affirmatively and unambiguous-

[30] 107 S.Ct. at 1837, quoting from *Curtis* v. *Loether*, 415 U.S. 189, 196 (1974).
[31] In *Tull*, the Court concluded that that action under the Clean Water Act was "clearly analogous to the 18th-century action in debt". 107 S.Ct. at 1836.

ly," for trial by jury in an action against the United States for the recovery of internal revenue taxes. *See* 28 U.S.C. § 2402 (1982).

Furthermore, as in this action, to enforce a monetary claim against the United States, the Supreme Court indicated, in *Galloway* v. *United States,* 319 U.S. 372 (1943):

> The suit is one to enforce a monetary claim against the United States. It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign. Whatever force the Amendment has therefore is derived because Congress, in the legislation cited, has made it applicable.

Id. at 388–89 (footnotes omitted).

More specifically, in suits against the United States involving the collection of taxes, such as customs duties, the Supreme Court has emphasized that the taxpayer does not have a right to trial by jury under the seventh amendment. For a unanimous Supreme Court in *Wickwire* v. *Reinecke,* 275 U.S. 101 (1927), Chief Justice Taft wrote:

> It was suggested, in the brief for the United States in resisting the application for certiorari, that the assignment of error made on behalf of the petitioner was inadequate in that it was not based on a reference to the Seventh Amendment to the Constitution requiring a jury trial in a civil case involving more than twenty dollars. This objection has not been renewed in the brief on the merits, *doubtless because the right of the petitioner to a jury in such a case is not to be found in the Seventh Amendment to the Constitution* but merely arises by implication from the provisions of § 3226, Revised Statutes, which has reference to a suit at law. *It is within the undoubted power of Congress to provide any reasonable system for the collection of taxes and the recovery of them when illegal, without a jury trial--if only the injunction against the taking of property without due process of law in the method of collection and protection of the taxpayer is satisfied. Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 272, 281, 282, 284; *Nichols* v. *United States,* 7 Wall. 122, 127; *Cheatham* v. *United States,* 92 U.S. 85, 88, 89.

Id. at 105–06 (emphasis added).

Reliance upon the case of *Tull* v. *United States,* 107 S. Ct. 1831 (1987) to support the demand for a jury trial in this action against the United States is misplaced. The *Tull* case was an action brought by the United States to recover potential civil penalties of about $23 million. The case did not arise from the laws enacted by Congress for the collection of taxes, but was brought by the United States seeking civil penalties against an individual for the alleged violation of the Clean Air Act. *Tull,* 107 S. Ct. at 1833–34. In *Tull,* the court noted that a civil penalty at common law was recoverable in courts of law, and stated that "[r]emedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." *Id.* at 1838. Apart from the helpful discussion

of the importance of the remedy sought, *Tull* does not support a claim for a jury trial in a monetary action against the United States to recover customs duties allegedly illegally exacted.

The claimed seventh amendment right to a jury trial in this action apparently is predicated upon the fact that, in the early years of our nation, there existed a common law right of action against a collector of customs, with a concomitant right to a trial by jury, to recover excessive customs duties. Starting in 1839, Congress enacted a series of statutes in which the common law cause of action was eliminated, and various statutory remedies were substituted in its place, culminating, in 1890, with a statutory remedy that had no provision for jury trials.

Accordingly, the question presented is whether the legislation of Congress, which did not provide for trial by jury in actions against the United States to recover customs duties alleged to be illegally exacted, is constitutional. In my opinion, that legislation is constitutional and valid.

The early tariff laws provided no statutory system for judicial review of determinations made by the collectors of customs. However, when a collector of customs exacted excessive or illegal duties, by application of common law principles the collector was personally liable to the importer for the amount illegally exacted.

Although, at that time, the federal courts did not have jurisdiction over those common law actions, it was possible for a collector, sued at common law in a state court, to set up a defense of federal authority, and remove the case into a federal court. *See* Act of Mar. 3, 1817, ch. 109, 3 Stat. 396.

The determinations of the collectors of customs as to the rate and amount of duties (classification issues) were judicially reviewed on common law principles. *See Elliott* v. *Swartwout*, 35 U.S. (10 Pet.) 137, 150 (1836). These common law actions, preferably brought in assumpsit, were the only remedies available to a person who sought to challenge administrative interpretations and applications of the tariff laws.

The personal liability of a collector of customs in an action in assumpsit was based upon the implied promise of the collector to repay the excessive amount collected. Hence, the practice developed that the collectors of customs retained large sums of money to indemnify themselves from any liability for duties paid under protest, and thus did not pay over to the Treasurer of the United States the disputed amounts until the litigation was terminated.

In 1839, Congress passed the first statute regulating disputes involving the classification of imports. *See* Act of Mar. 3, 1839, ch. 82, § 2, 5 Stat. 339, 348–49. The law required the collectors of customs immediately to place all moneys collected by them to the credit of the Treasurer. That law also made the Secretary of the Treasury the final arbiter for examining and determining claims for refunds

of duties paid under protest to the collectors. The 1839 law made no provision for judicial review of the Secretary's determinations.

In 1845, the Supreme Court, in the case of *Cary* v. *Curtis,* 44 U.S. (3 How.) 236 (1845), sustained the constitutionality of the Act of Mar. 3, 1839, and held that, by removing the ground or basis for the collector's implied promise to repay, Congress took away from the importer the previously existing common law right of action against the collector. 44 U.S. (3 How.) at 251–52. In separate dissents, Justices Story and McLean expressed their views that the law, as interpreted by the majority, was unconstitutional.

Soon after the *Cary* decision, Congress passed the explanatory Act of Feb. 26, 1845, ch. 22, 5 Stat. 727, "which, by legislative construction of the Act of 1839, restored to the claimant his right of action against the collector * * *." *Arnson* v. *Murphy,* 109 U.S. 238, 241 (1883).

In an 1864 law, Congress continued to allow a right of action against the collector, but conditioned that right upon an appeal from the collector's determination to the Secretary of the Treasury, and further provided that the action against the collector could not be brought until after the appeal to the Secretary was decided, or not acted upon, within a specified time. *See* Act of June 30, 1864, ch. 171, §§ 14,15, 13 Stat. 214–15.

In *Arnson* v. *Murphy,* the Supreme Court recognized that the effect of the 1864 Act was to repeal the Act of Feb. 26, 1845, and that the action against the collector of customs, after 1864, was, "converted into an action based entirely on a different principle–that of a statutory liability, instead of an implied promise–which if not originated by the Act of Congress, yet is regulated, as to all its incidents, by express statutory provisions." *Arnson,* 109 U.S. at 243. The Supreme Court stressed that "Congress having undertaken to regulate the whole subject, its legislation is necessarily exclusive." *Id.; see also De Lima* v. *Bidwell,* 182 U.S. 1, 178 (1901).

The statutory right of action against a collector, including the statutory right to trial by jury, continued until 1890. In that year, by the Customs Administrative Act of 1890, ch. 407, 26 Stat. 131, Congress consciously, deliberately, and with full awareness of its constitutional implications, repealed the statute allowing an action against a collector, with its concomitant statutory right to trial by jury before the courts. In 1890, as explained below, Congress substituted a "radically" new statutory system for an action against the United States before a newly established Board of General Appraisers. The new system intentionally removed the right to a jury trial before the courts, and "substituted" a trial before the general appraisers.

The Board of General Appraisers and the new statutory system were intended to provide better administrative control necessary to implement the complete overhaul of the tariff system brought about by the McKinley Tariff Act, ch. 1244, 26 Stat. 567, also enacted in

1890. Congress recognized that the prior system resulted in differing and conflicting tariff law interpretations by courts and juries throughout the country which created undue delay, doubts and difficulties in the collection of the country's revenues. By the Customs Administrative Act of 1890, after 100 years of experience with other methods, Congress removed from the ordinary courts litigation over tariff law interpretation. To achieve uniformity, Congress expanded the power of the general appraisers to decide the technical problems inherent in the classification and valuation of imported merchandise. *See generally* F. Frankfurter & J. Landis, *The Business of the Supreme Court* 149 (1928).

The statutory antecedents and applicable Supreme Court decisions, including *Cary* v. *Curtis,* were, of course, well known to the Congress in the deliberations and debates which led to the enactment of the 1890 law.

This Congressional awareness is made clear by the following excerpt from the Report of the House Committee on Ways and Means, which quoted the Senate Committee Report:

> *It will be seen that the proposed sections are a radical departure from the existing law.* They substitute for the decision of the Secretary of the Treasury, in all cases of appeal upon questions of classification and rate of duty and upon questions as to fees, charges, and exactions, the decision of the board of appraisers provided for in the preceding section, *and confer upon said board in the first instance exclusive jurisdiction of all said questions.* They confer upon the several circuit courts of the United States appellate jurisdiction upon all questions of law as respects classification and rate of duty, with a final determination by the Supreme Court of the United States in difficult cases, or in cases where the Attorney-General shall be of opinion that the matter in controversy should be appealed thereto.
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> * * * * * * *
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> Previous to 1839 a person paying duties claimed by him to have been illegally exacted had a common-law right of action against the collector to whom the payment had been made, provided the person making such payment gave notice at the time of payment that the duties charged were too high, and that the party paying so paid in order to secure possession of his merchandise, and that he intended to sue to recover back the amount so erroneously paid, and provided that he also gave notice to the collector not to pay over the amount into the Treasury. Collectors of customs being thus personally liable, it was their practice to retain large sums of money in their possession on the ground that it had been paid under protest, and that they must indemnify themselves against liability. This evil of retention of moneys by collectors became so marked that by the second section of the act of March, 1839, all moneys were required to be paid into the Treasury.
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> *It was held by the Supreme Court in the case of Carey [sic] vs. Custis (3 Howard, page 236) that this act deprived the importer of all right of action in the courts for duty erroneously or illegal-*

> *ly exacted from him.* This decision of the court, therefore, left him no remedy by an appeal to the Secretary of the Treasury, who was authorized, whenever it was shown to his satisfaction in any case of unascertained duties, etc., to refund such overpayment. It thus being held that the importer was excluded by this act from commencing suit at common law, Congress, on the 26th of February, 1845 (vol. 5, Stat. at Large, page 727), provided that nothing in the act should be construed to take away or impair the right of any person or persons to maintain a suit at common law.
>
> *And this provision continued in force until June 30, 1864, when the sections, 2931 and 2932, were enacted, since which time importers have been compelled to resort to the statutory remedy therein provided, and by said sections the common law remedy which existed up to that time was taken away* * * *.
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> * * * * * * *
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> It is believed that the proposed sections will afford claimants a speedy, just, and efficacious remedy. The tribunal in the first instance will be composed of officers selected with a view to their peculiar fitness and qualifications for the duties devolving upon them. Their time and attention will be given exclusively to a study of the tariff laws and to their practical application, and they could readily hear and dispose of the cases as they might arise in an intelligent and satisfactory manner; but if they shall make a mistake as respects the true construction of the statutes relating to classification and rate of duty, a speedy and efficacious remedy is provided for a review of their decisions as respects the law of the case, their finding of facts being conclusive upon the Government and the importer.

H.R. Rep. No.6, 51st Cong., 1st Sess. 7–8 (1980) (emphasis added).

One of the principal features of the 1890 legislation, as proposed by its leading congressional sponsor, Congressman (later President) William McKinley, then Chairman of the House Committee on Ways and Means, was the provision for the appointment of a board of nine general appraisers, before whom trials would be conducted.

When the House convened as a Committee of the Whole to consider the bill, there was vigorous opposition to the McKinley proposal, much of which focused upon the fact that the new system would take away from the importer, in a classification case, the right to a trial by jury against a collector of customs. 21 Cong. Rec. 825 (1890). Although acknowledging that the right of trial by jury as to questions of fact would be taken away, the proponents explained that "there is a substitute for the jury in the nine appraisers * * *." *Id.*

During the debate in the House, the focus shifted to the Act of Mar. 3, 1839, *Cary* v. *Curtis,* and the explanatory Act of Feb. 26, 1845. The proponents, relying upon the Supreme Court opinion in *Cary,* maintained that the proposed new system was not constitutionally defective in that:

> Congress, [as] the legislative branch of the Government, was supreme in its power of levying and collecting taxes, and that if

> they allowed a suit in any case it was only an act of clemency and beneficence on the part of the Government; that they need not allow any claim for redress, *but they might make the Secretary of the Treasury the supreme tribunal in the case, both as to the law and as to the facts, and take away entirely the right of trial by jury.*

Id. at 818–19 (emphasis added).

After three days of extensive consideration by the House, Chairman McKinley summarized the position of the proponents as it pertained to the right to trial by jury:

> Mr. McKinley. Mr. Chairman, I had intended to cite some authorities on the constitutional question raised on the fifteenth section; but I understand from the discussion this morning that that position has been abandoned and *that no gentlemen now seriously questions the constitutional right of Congress to enact the legislation proposed in the bill under consideration. The question, therefore, has rather drifted to one of public policy—whether it is fair, just, and necessary to create a board of general appraisers, with the powers granted in the section under debate, and to deprive, as it is said, the importer of the right of trial by jury.*

Id. at 833 (emphasis added).

Congress, in the 1890 law, specifically repealed section 3011 of the Revised Statutes of the United States (1878), which authorized trial by jury, in actions against a collector of customs. *See* Customs Administrative Act of 1890, ch. 407, § 29, 26 Stat. 131, 141–42. Furthermore, Congress relieved the collectors of any personal liability resulting from a determination as to the classification or rate of duty of imported merchandise. *See* Customs Administrative Act of 1890, ch. 407, § 25, 26 Stat. 131, 141; *see also* H.R. Rep. No. 6, 51st Cong., 1st Sess. 10.

In repealing section 3011 of the Revised Statutes, Congress removed the jurisdiction from the federal courts, to hear suits against the collectors, and conferred jurisdiction upon the Board of General Appraisers to review determinations of the collectors, with a further review in the circuit courts. *See Glidden Co.* v. *Zdanok*, 370 U.S. 530, 575 (1962).

The legislative history of the Customs Administrative Act of 1890 leads me to the inescapable conclusion that the Congress carefully considered the question of the importer's right to a jury trial in an action for the refund of customs duties, and that it examined fully and completely the constitutional and policy arguments against eliminating that right. It is beyond doubt that Congress concluded that there was no constitutional bar to removing the right to trial by jury. In clear and unambiguous terms, Congress intentionally and deliberately chose to eliminate jury trials in actions against the United States to recover excessive or illegal customs duties.

The Customs Administrative Act of 1890 was interpreted and applied by the Supreme Court in the case of *Schoenfeld* v. *Hendricks,* 152 U.S. 691 (1894). The Supreme Court held that after the 1890 law no action could be maintained against a collector of customs either at common law or under the statutes of the United States, since the remedy given by the 1890 statute through the Board of General Appraisers was exclusive. *Shoenfeld,* 152 U.S. at 692–93. Also, it was clear to the Supreme Court, in *United States* v. *Ranlett & Stone,* 172 U.S. 133 (1898) that: "[t]he remedies provided by the Act of June 10, 1890, furnish the equivalent for the action against the collector which was originally the remedy for an illegal exaction of duties * * *." 172 U.S. at 145–46.

It is not necessary here to trace the subsequent statutory evolution of the Board of General Appraisers to today's Article III United States Court of International Trade. *See* Re, *Litigation Before the United States Court of International Trade,* 19 U.S.C.A. §§ 1 to 1300 (West Supp. 1988). Nevertheless, it is important to note that this court possesses "all the powers in law and equity of, or as conferred by statute upon, a district court of the United States," 28 U.S.C. § 1585 (1982); and, the court will make its determination in this action *de novo,* "upon the basis of the record made before the court," 28 U.S.C. § 2640 (1982).

It is crystal clear, therefore, that Congress removed one form of statutory remedy and substituted another with procedures which today fully meet the requirements of due process. The fact that the existing remedy does not include, and has not included since 1890, a provision for trial by jury, does not render the existing remedy and its procedures unconstitutional.

Of course, this action does not present a claim that Congress has withdrawn from any judicial review a cause of action which was the subject of a suit at common law. There is a vast difference between the total denial of any remedy, and the substitution of another statutory remedy for one that previously existed. As Professor Hart concluded: "It must be plain that Congress necessarily has a wide choice in the selection of remedies, and that a complaint about action of this kind can rarely be of constitutional dimension." *See,* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialetic,* 66 Harv. L. Rev. 1362, 1366 (1953). Furthermore, the power of Congress to regulate the jurisdiction of the federal courts, and to determine the remedies they may afford, has long been recognized by the Supreme Court. *See Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 513 (1869).

On this question, the Supreme Court's opinion in *Anniston Mfg. Co.* v. *Davis,* 301 U.S. 337 (1937) is particularly instructive. In that case, plaintiff alleged the unconstitutionality of a statute which took away a statutory right of action against the collector of internal revenue and substituted a different statutory action directly against the United States. *Anniston,* 301 U.S. at 341–42. The Su-

preme Court agreed with the government's statement that the Court was not presented with the question of " 'the power of Congress to withdraw suit entirely, both against the Collector and against the Government * * *.' " *Id.* at 342. In upholding the constitutionality of the new statutory remedy, Chief Justice Hughes wrote:

> The Government has not denied its obligation to refund the amounts found in the authorized proceeding to be recoverable, but has recognized that obligation. *In such a case, the substitution of an exclusive remedy directly against the Government is not an invasion of constitutional right.* Nor does the requirement of recourse to administrative procedure establish invalidity if legal rights are still suitably protected. *The immediate question is whether the authorized proceeding affords a fair and adequate remedy.* We accordingly inquire whether the prescribed procedure gives an opportunity for a full and fair hearing and determination of all questions of fact and adequately provides for the protection of the legal rights of the claimant, embracing whatever right of refund the claimant is entitled to assert under the Federal Constitution.

Id. at 343 (emphasis added).

The teaching of *Anniston* applies perforce to this case. Congress has not denied any obligation by the Government to refund excessive or illegally exacted customs duties. Instead, Congress established an exclusive and effective remedy against the United States, in place of a previous common law, and later statutory, right of action against the collectors of customs. Accordingly, the question here, as in *Anniston,* is not the power of Congress to remove a cause of action entirely, but rather "whether the authorized proceeding affords a fair and adequate remedy." *See id.* As in *Anniston,* in this case, the existing procedures, established by Congress, before this court provide a claimant against the United States with "an opportunity for a full and fair hearing and determination" of all questions of fact and issues of law. In these suits against the United States, Congress has authorized a statutory remedy which is more effective and complete than any which existed at common law.

To conclude that the plaintiff in this action against the United States is entitled to a jury trial under the seventh amendment, this court must hold that the Customs Administrative Act of 1890 was unconstitutional solely because Congress did not provide for trial by jury. The court would have to conclude that the Supreme Court was wrong in *Cary,* and that the Act of Mar. 3, 1839 was unconstitutional. The court would also have to question the constitutionality of the Customs Courts Act of 1970, and the Customs Courts Act of 1980, neither of which provided for trial by jury in these actions. For the reasons stated, I am not persuaded that those determinations should be made.

Since I am of the opinion that plaintiff, in this action against the United States, does not have a right to a jury trial under the sev-

enth amendment, or applicable statutes, I would grant the defendant's motion to strike plaintiff's demand for a jury trial.

Pursuant to 28 U.S.C. § 1292(d)(1) (1982), since I believe that a controlling question of law is involved, with respect to which there is substantial ground for difference of opinion, and that an immediate appeal from this order may materially advance the ultimate termination of this litigation, I would also certify the question for immediate appeal to the United States Court of Appeals for the Federal Circuit.

(Slip Op. 88–5)

SILVER REED AMERICA, INC. AND SILVER SEIKO, LTD., PLAINTIFFS, BROTHER INTERNATIONAL CORP. AND BROTHER INDUSTRIES, LTD., PLAINTIFF-INTERVENORS *v.* UNITED STATES OF AMERICA, DEFENDANT, CONSUMER PRODUCTS DIVISION, SCM CORP., DEFENDANT-INTERVENOR, AND CONSUMER PRODUCTS DIVISION, SCM CORP., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT, SILVER REED AMERICA, INC., SILVER SEIKO, LTD., BROTHER INTERNATIONAL CORP., BROTHER INDUSTRIES, LTD., AND NAKAJIMA ALL CO., LTD., DEFENDANT-INTERVENORS

Consolidated Court No. 83–10–01522

Before NEWMAN, *Senior Judge.*

[Final Results of administrative review reversed in part and remanded.]

(Decided January 12, 1988)

MEMORANDUM OPINION AND ORDER

Willkie Farr & Gallagher (Christopher A. Dunn, William J. Clinton, Kenneth J. Pierce, Zygmunt Jablonski, Esqs., of counsel) for Silver Reed America, Inc. and Silver Seiko, Ltd.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., John M. Breen, Esqs.); *Robert E. Walton,* Esq., General Counsel, for SCM Corporation.

Tanaka, Ritger & Middleton, Esqs., for Brother Industries, Ltd. and Brother International Corporation.

Ben J. Irvin and *John B. Rehm,* Esqs., for Nakajima All Co., Ltd.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice (*Velta A. Melbrencis,* Attorney); *Deborah A. Persico,* Attorney-Adviser, Office of the Deputy Chief Counsel for Import Administration, United States Department of Commerce, for the United States.

NEWMAN, *Senior Judge:*

INTRODUCTION

Silver Reed America, Inc. ("Silver Reed") and Silver Seiko, Ltd. ("Silver Seiko") (collectively "Silver") have moved in this consolidat-

ed action for judgment on the agency record pursuant to USCIT Rule 56.1 respecting *Portable Electric Typewriters from Japan; Final Results of Administrative Review of Antidumping Order*, 48 Fed. Reg. 40761 (September 9, 1983). Silver contends that certain determinations made by the United States Department of Commerce, International Trade Administration ("Commerce" or "ITA"), in its Final Results of the first administrative review of the antidumping order on portable electric typewriters ("PETs") from Japan are unsupported by substantial evidence on the record and are otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B) (1982).

Specifically, Silver challenges the following determinations made by ITA in its administrative review:

(1) ITA's deductions of imputed credit or interest expenses from Silver's exporter's sales prices ("ESP");

(2) ITA's deductions of imputed currency exchange rate losses from Silver's ESP;

(3) ITA's disallowance of Silver's claim for an adjustment to foreign market value for differences in quantities of merchandise produced for sale in the United States market and in Japan; and

(4) ITA's disallowance of Silver's claim for a level-of-trade adjustment to foreign market value.

Accordingly, Silver seeks reversal in part of the Final Results of the administrative review and remand to ITA for further proceedings. For the reasons set forth below, ITA's Final Results are reversed in part, and this action is remanded for further proceedings and recalculation of the dumping margins for Silver's PETs consistent with this opinion and order.

Background

On September 9, 1983 Commerce published the Final Results of its administrative review under section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675, covering PETs exported from Japan by Brother Industries, Nakajima All Co., Ltd. and Silver Seiko for varying periods during 1980 and 1981. 48 Fed. Reg. 40761. In adjusting the prices in the two markets for comparison purposes, Commerce deducted from the Silver's ESP various imputed selling expenses and exchange rate losses. Commerce also rejected Silver's claims for adjustments: (1) predicated on differences in quantities of PETs produced for sale in the United States and in Japan; and (2) predicated upon sales at different levels of trade in the United States and in Japan. 48. Fed. Reg. 40763–4.

Issues Presented

1. Whether ITA properly deducted from Silver's ESP imputed, rather than actual, presale inventory carrying costs or expenses related to selling Silver's PETs in the United States;

2. Whether ITA properly deducted imputed currency exchange rate losses from ESP;

3. Whether ITA properly rejected Silver's claim for a quantity discount adjustment in determining the foreign market value of Silver's PETs;

4. Whether ITA properly rejected Silver's claim for a level-of-trade adjustment in determining the foreign market value of Silver's PETs.

DISCUSSION

I

The Court of Appeals for the Federal Circuit has held that "the statute [Trade Agreements Act of 1979] reveals tremendous deference to the expertise of the Secretary of Commerce in administering the antidumping law." *Smith Corona Group* v. *United States,* 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984). *See also ICC Industries, Inc.* v. *United States,* 812 F.2d 694, 699 (Fed. Cir. 1987) ("[a]n agency's interpretation of a statute which it is authorized to administer is 'to be sustained unless unreasonable and plainly inconsistent with the statute, and [is] to be held valid unless weighty reasons require otherwise' " (quoting from *Melamine Chemicals, Inc.* v. *United States,* 732 F.2d 924, 928 (Fed. Cir. 1984). Similarly, in *ICC Industries, Inc., id.* at 699, the court commented that "[a]n agency's 'interpretation of the statute need not be the *only* reasonable interpretation or the one which the court views as the most reasonable' " (quoting from *Consumers Products Div., SCM Corp.* v. *Silver Reed America, Inc.,* 753 F.2d 1033, 1039 (Fed. Cir. 1985) (emphasis in original). This court has also stressed that "[t]he deference granted or extended to the agency's interpretation of its statutory mandate also applies to the methodology that the agency employs in fulfilling its lawfully delegated mission." *Ceramica Regiomontana, S.A.* v. *United States,* 636 F. Supp. 961, 965–966 (CIT 1986), *aff'd,* 810 F.2d 1137 (Fed. Cir. 1987). In that regard, this court went on to say (*Id.* at 966);

> In order for the ITA effectively to administer the countervailing duty laws, it is necessary to permit some methodological flexibility. As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology. *See Chevron U.S.A. Inc.* v. *Natural Resources Defense Council,* 467 U.S. 837, 843, 104 S.Ct. 2778, 2783, 81 L.Ed.2d 694 (1984); *Abbott* v. *Donovan,* 6 CIT 92, 570 F. Supp. 41, 46–47 (1983).

Observing the foregoing principles concerning judicial review of agency action in antidumping cases as well as the statutory standard of review in such cases (*see* 19 U.S.C. § 1516a(b)(1)(B) (1982)),

this court concludes that, except for several matters discussed *infra* concerning which ITA has erred, ITA's statutory interpretation and methodology employed in the Final Results challenged in this case are reasonable and in accordance with law, and its determinations are supported by substantial evidence in the administrative record.

II

During the period covered by the first administrative review, Silver Seiko manufactured and transferred PETs to its wholly-owned United States subsidiary, Silver Reed, and the latter resold them from inventory to its United States customers. Silver Reed then transferred payment for the merchandise to Silver Seiko when Silver Seiko's payment terms expired. In adjusting the prices in the two markets for comparison purposes ITA did not limit its deductions from ESP to those based on actual cash outlays reported by the companies, but also deducted certain imputed selling costs or expenses calculated according to certain formula as if they were interest or credit expenses.

Silver does not object to the deduction from ESP of an imputed direct credit expense for the time between Silver Reed's resale of the PETs in the United States and Silver Reed's receipt of funds from the unrelated United States customer. Silver's memo at 12–13.[1] However, Silver challenges:

(1) the imputation of indirect selling expenses consisting of pre-sale inventory carrying costs for the interval of time between the date of shipment of merchandise from Japan to the United States and resale by Silver Reed to unrelated United States customers;

(2) the double-counting of actual interest expenses for inventory financing in addition to an imputed inventory financing expense for the time period the merchandise was in Silver Reed's inventory; and

(3) the deduction of an imputed direct credit expense for the time period between Silver Reed's receipt of funds from the unrelated United States customer and its repatriation of those sales proceeds to Silver Seiko.

Section 772(e)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677a(e)(2), provides:

> **(e) Additional adjustments to exporter's sales price.**—For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—
>
> * * * * * * *
>
> (2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, * * *

ITA interprets the foregoing statutory provision as referring to both direct and indirect selling expenses related to United States

[1] Indeed, Silver acknowledges that such deduction is an appropriate part of the adjustment for differences in circumstances of sale. Silver's Memo. at 27.

sales, and in the challenged Final Results ITA deducted from ESP both direct and indirect imputed selling expenses:

> The Department considers the calculated expense between the time Silver Seiko ships the merchandise to the United States and the time Silver Reed sells it to an unrelated U.S. customer as an indirect selling expense to be deducted from exporter's sales price. The Department considers the time between Silver Reed's sale and Silver Reed's repayment of Silver Seiko to be a direct selling expense. For both types of expense, the Department imputed values. These are expenses that would have been incurred in the U.S. but for Silver Seiko's action. It is therefore proper under the Tariff Act to impute such a cost and deduct it in calculated ESP.

48 Fed. Reg. at 40765, A.R. 7549.

As noted *supra*, Silver disputes ITA's deduction of imputed indirect selling expenses consisting of pre-sale inventory carrying costs which were calculated from the date of shipment of the PETs from Japan to the United States until the date when Silver Reed resold the PETs to an unrelated United States customer. 48 Fed. Reg. 49765. Commerce interprets the language in section 1677a(e)(2), "expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise," as covering direct and indirect selling expenses related to United States sales regardless of the geographic location of incurrence of the expense. Silver admits that under the statute selling expenses incurred for United States sales are deductible from ESP regardless of the party that incurred the expense—including the exporter in a foreign country. Silver's reply memo at 12. Nonetheless, Silver urges that to be deductible from ESP, the selling expenses themselves must be actually incurred "in the United States." The plain language of the statute supports Silver's contention, and therefore ITA erroneously deducted from ESP an imputed interest expense for the period between shipment of the merchandise from Japan and the entry of that merchandise in the United States. Obviously, the imputed financing cost for "time on the water" before importation is not an expense incurred "in the United States" under the statute.

The court turns to Silver's contention that ITA's interpretation of section 1677a(e)(2) as permitting the deduction of imputed selling expenses from ESP violates the statute since it permits the deduction only of actual cash outlays and not fictional "expenses that could have been incurred" or "expenses whether or not actually incurred." Silver's Memo. at 30–31. On that score, Silver urges that ITA's action is contrary to generally accepted accounting principles (which do not impute interest costs for holding merchandise), the language of the statute (which limits deductions from United States Price to "expenses generally incurred") and the rule enunciated in *F.W. Myers* v. *United States*, 72 Cust. Ct. 219, 376 F. Supp. 860

(1974), that "all" value determinations under the antidumping law must be based on "actual amounts of expenses incurred." Continuing, Silver alleges that ITA's position relative to imputed interest has been inconsistent.

In essence, Silver maintains that the most reasonable interpretation of the statutory language, "expenses generally incurred," is that only actual cash outlays incurred in selling the merchandise as reported in the company accounting records should be deducted. Silver's Memo at 31. Defendant, however, argues against Silver's restrictive interpretation pointing out that since in the statute the word "generally" qualifies the word "incurred," Congress intended that expenses that are generally or usually incurred by or for the account of the exporter in the United States must be deducted from ESP, regardless of whether the expenses are actually carried on the company's books. The court finds that ITA's construction of the statute as authorizing deduction of imputed selling expenses is reasonable under certain circumstances and effectively implements the intent of Congress in section 1677a(e)(2).

Silver's reliance upon such cases as *F.W. Myers & Co.* v. *United States*, 72 Cust. Ct. 219, 376 F. Supp. 860 (1974), and *Brother Industries, Ltd.* v. *United States*, 3 CIT 125, 540 F. Supp. 1341 (1982), *aff'd sub nom. Smith-Corona Group* v. *United States*, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984), is misplaced. As aptly pointed up by defendant, those cases did not involve deductions from ESP in conformance with section 1677a(e)(2), but rather involved adjustments to foreign market value for differences in circumstances of sale pursuant to section1677b(a). Given the incentive of exporters to minimize dumping margins, this court is not persuaded that adjustments to foreign market value (which adjustments exporters have every incentive to maximize) are analagous to deductions from ESP (which deductions exporters have an incentive to minimize).

While defendant concedes that ITA's present practice of deducting imputed costs from ESP is inconsistent with its former practice of deducting only actual cash outlays, the court is advised that ITA now regularly follows the practice of deducting from ESP all expenses related to selling the merchandise in the United States whether or not the expenses are reflected in the exporter's books.[2] Defendant's Memo at 19–20.

Finally, Silver argues that Commerce improperly deducted a direct expense for the time between Silver Reed's receipt of sales proceeds from its United States customers and the "repatriation" of those funds to Silver Seiko. It appears that in connection with all sales, Silver Reed transferred funds to Silver Seiko after Silver Reed's resale of the PETs to unrelated United States customers but prior to receipt of the funds from those customers. ITA, therefore,

[2] *See, e.g., Color Televisions from Korea, Final Results of Administrative Review of Antidumping Duty Order*, 49 Fed. Reg. 50420, 50427, 50430 (Dec. 28, 1984); *Television Receiving Sets, Monochrome and Color, from Japan; Final Results of Administrative Review of Antidumping Finding*, 50 Fed. Reg. 24278 (June 10, 1985).

properly deducted an imputed direct credit expense for the period between resale of the PETs by Silver Reed to its United States customers and receipt of funds by Silver Reed. However, Commerce concededly should not have, and did not, deduct a credit expense for the "transfer of funds" period. Defendant's memo at 8. In any event, if in fact such deduction was made, as alleged by Silver, ITA is directed to correct that error on remand.

Respecting the "double-counting" issue raised by Silver, Commerce acknowledges that it erred in its deduction of imputed expenses for six invoices. Commerce requests a remand "in order to reprogram the data, examine the calculations made for imputed direct and indirect selling expenses and to correct the errors previously made." Defendant's memo at 7. Accordingly, ITA is directed to review the record and correct any errors in double-counting of selling expenses arising from imputation of such expenses.

III

Silver challenges ITA's adjustment of ESP predicated upon certain currency exchange rate "losses" recorded in Silver's books. In this connection, Silver contends that the exchange rate loss adjustment was improper because no variation actually occurred in the dollar value of the PETs. Hence, argues Silver, exchange losses are irrelevant when the price-to-price comparison is made in United States dollars and the United States sales are denominated in dollars. Silver further maintains that ITA's imputation of exchange rate losses in a price-to-price comparison involving dollar-denominated United States sales constitutes an unjustified departure from ITA's long-standing practice.

Defendant concedes that, under the circumstances presented here, it has not been the practice of ITA to make an adjustment for currency exchange rate gains and losses, and that Commerce should not have deducted the exchange rate losses as an indirect expense from the United States Price. Inasmuch as defendant admits that ITA erred in deducting imputed currency exchange rate losses from ESP, this error must be corrected upon remand, as requested by defendant.

IV

The court now addresses Silver's claim that ITA improperly disallowed an adjustment in determining the foreign market value of Silver's PETs for the difference in the quantity of PETs sold in Japan and in the United States. Before ITA, Silver sought to establish a cost justification for the claimed adjustment of foreign market value in compliance with 19 C.F.R. § 353.14(b)(2). Silver argued before Commerce that the foreign market value for its PETs should be adjusted for differences in the quantity produced for sales in the United States and in Japan based on cost savings which it experienced in producing for the United States market.

Silver's Comments:

> Comment 19: The Department erroneously denied Silver Seiko's claim for an adjustment for differences in the quantities produced for sales in the U.S. and Japan. Since home market production runs are much smaller than U.S. production runs, Silver Seiko contends that the per-unit amount of fixed expenses, specifically labor expenses, is much higher on home market sales. Silver Seiko disagrees with the Department's reason for denying the claim, i.e. that the cost adjustments proposed by Silver Seiko were based on Silver Seiko's special time studies and were not substantiated by Silver Seiko's customary labor cost accounting procedure, the Management Time Method. Silver Seiko argues that the Management Time Method is not applicable to the tasks involved in setting up the production runs because they are unlike the simple and repetitive tasks reliably measured by the Management Time Method. Further, in previous determinations in this case, the Department denied this claim not because its record keeping was inadequate, but because the expense related to overhead costs. Silver Seiko argues that this type of reversal of policy decisions applies the antidumping law as a trap for the unwary, rather than encourages an exporter to make fair pricing decisions.

48 Fed. Reg. at 40764.

Commerce rejected Silver's contention, stating:

> Department's Position: The Department acknowledges that Silver Seiko sells in smaller quantities in its home market than it does to the United States. However, when we verified the expense, we found that Silver Seiko does not produce for specific orders in the home market but instead produces machines which are then placed in the warehouse. Therefore, we regard these increased per-unit expenses as general overhead costs, as we have done in the past. In denying the claim, we did not rely on inadequate record keeping.

48 Fed. Reg. at 40764.

An adjustment for quantity discounts in determining foreign market value is authorized by 19 U.S.C. 1677b(a)(4)(A), which provides so far as pertinent:

> (4) Other adjustments.—In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value * * * is wholly or partly due to—
>
> (A) the fact that the wholesale quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale, for exportation to, or in the principal markets of, the United States, as appropriate, in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale, in the principal markets of the country of exportation in the ordinary course of trade for home consumption

(or, if not so sold for home consumption, then for exportation to countries other than the United States);

* * * * * * *

then due allowance shall be made therefor.

In 1980, Commerce promulgated regulations which implemented 19 U.S.C. § 1677b(a)(4)(A). The regulations provided in relevant part:

(a) In general. In comparing the United States price with such applicable criteria as sales or offers, on which a determination of foreign market value is to be based, comparisons normally will be made on sales of comparable quantities of the merchandise under consideration. Further, reasonable allowances will be made for differences in quantities to the extent that it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences in the quantities sold. In determining allowances for differences in quantity, consideration will be given, among other things, to the practice of the industry in the country of exportation with respect to affording in the home market * * * discounts for quantity sales which are available to those who purchase in the ordinary course of trade.

(b) Criteria for allowances. Allowances for price discounts based on quantitative differences in sales ordinarily will not be made unless:

(1) Six month rule. The exporter during the period covered by the antidumping investigation as established under § 353.38 (or during such other period as investigation shows is more representative) had been granting quantity discounts of at least the same magnitude with respect to 20 percent or more of such or similar merchandise sold in the home market * * * in the ordinary course of trade; or

(2) Cost justification. The exporter can demonstrate that the discounts are warranted on the basis of savings which are specifically attributable to the production of the different quantities involved.

19 C.F.R. § 353.14(a) and (b).

Relying on subsection (b)(2) of the foregoing regulation, Silver claims that the foreign market value of its PETs should have been adjusted by ITA to offset the lower United States prices specifically attributable to cost efficiencies in high volume production for the United States market. Defendant readily acknowledges Silver has demonstrated that higher per unit costs were associated with the production of PETs for the home market, but urges that Silver "failed to show a link between the differences in cost and the basis for the claimed adjustment, in this case quantity." Deft. Memo at 24.

From section 1677b(a)(4) and 19 CFR § 353.14(a), it is clear the party claiming a quantity discount allowance must establish to the agency's satisfaction that any price differential is due to the fact the wholesale quantities in which the merchandise is sold for expor-

tation to the United States is lesser or greater than the wholesale quantities in which the merchandise is sold in the home market.

Defendant maintains that Silver failed to link the differences in price between its smaller quantity sales in the home market and larger quantity sales in the United States with the difference in the cost of producing different quantities for the two markets. According to defendant, inasmuch as home market PETs were not produced for specific orders, but rather for inventory, Silver simply chose to produce fewer PETs *per production run* for the home market regardless of the quantity sold. Defendant further stresses that ITA will not as a matter of methodology grant a quantity discount adjustment based solely upon cost savings from differences in production runs for products sold in the home market and in the United States.

The court sees no error concerning ITA's approach to the quantity discount adjustment claimed by Silver in requiring a showing of a link between the differences in cost and the basis for the claimed adjustment. The evidence submitted by Silver in support of its claim that it costs less to produce PETs for sale in the United States merely suggests that it was Silver's choice to produce fewer PETs per production run in the home market, irrespective of the quantities sold. Consequently, the court holds that Commerce reasonably treated the admittedly higher unit costs for the PETs produced for home market sales as general overhead expenses, and properly denied Silver's claim for an adjustment to foreign market value for the difference in the quantities produced for sales in Japan and in the United States.

V

Silver complains of ITA's refusal to grant a level-of-trade adjustment for Silver's home market prices. Commerce's regulation 19 C.F.R. § 353.19 provides:

> The comparison of the United States price with the applicable price in the home market of the country of exportation * * * generally will be made at the same commercial level of trade. However, if it is found that the sales of the merchandise to the United States or in the applicable foreign market at the same commercial level of trade are insufficient in number to permit an adequate comparison, the comparison will be made at the nearest comparable level of trade and appropriate adjustments will be made for differences affecting price comparability.

During the administrative review, Silver claimed it was entitled to a level-of-trade adjustment due to the fact that it sold only to retailers in the home market and only to wholesalers in the United States and that there were differences in selling costs in the two markets:

> Comment 20: The Department erroneously denied Silver Seiko's claim for an adjustment for differences in level of trade.

> In its home market, Silver Seiko sells only to retailers, using three market channels, while on certain sales to the U.S. it sells to Olivetti, a wholesaler. Section 353.19 of the Commerce Regulations permits an adjustment for actual differences in level of trade, to the extent it can be established that the differences in level of trade, produce differences in cost. Silver Seiko submits that it has established a reasonable basis for quantifying the differences in cost due to level of trade through its separation of corporate divisions, with one for large Japanese retailers, one for small Japanese retailers, and one for Olivetti.

48 Fed. Reg. at 40764.

Commerce rejected Silver's claim, stating:

> Department's Position: The Department maintains that Silver Seiko did not adequately demonstrate that the difference in cost between the two markets is due to a difference in level of trade. Moreover, in the final affirmative determination in this case (45 FR 18416–18, March 21, 1980), we stated that "[s]ince the price comparison was made in both markets using sales to customers who brought in large wholesale quantities, no adjustment for differences in level of trade is warranted."

48 Fed. Reg. at 40764–40765.

ITA's position that Silver did not adequately demonstrate that the difference in cost between the two markets was due to the difference in the level of trade was not explained in ITA's Final Results. Defendant now contends that a company must establish its claim for a level-of-trade adjustment by showing that within the *home market,* where all other facts are equal, sales at different levels of trade incur different costs. Deft. Memo at 28. According to defendant, the foregoing approach establishes that the difference in price between United States sales and home market sales is due to a difference in the levels of trade rather than simply to differences resulting from disparate market conditions in two distinct markets. However, as noted above, defendant's rationale here was not articulated by Commerce in its Final Results.

Silver also challanges Commerce's denial of the level-of-trade adjustment predicated on the second reason contained in Commerce's comment relating to Silver's claim for the level-of-trade adjustment. Thus, Silver contends that Commerce denied the level-of-trade adjustment in the administrative review for the erroneous reason for which Commerce previously denied the level-of-trade adjustment in the less-than-fair-value determination that was the subject of *Silver Reed America, Inc.* v. *United States,* 7 CIT 23, 581 F. Supp. 1290 (1984), *rev'd on other grounds sub nom. Consumer Products Division, SCM Corp.* v. *Silver Reed America, Inc.,* 753 F.2d 1033 (Fed. Cir. 1985). The court agrees with Silver's contention that the second reason stated by ITA for denying the level-of-trade adjustment was rejected in *Silver Reed, supra.*

On remand, Commerce is directed to fully explain its position that Silver did not adequately demonstrate that the difference in cost between the two markets is due to the difference in level of trade, and to specifically disclose wherein Silver failed in its proof in this matter. Moreover, on remand Commerce shall not predicate its determination regarding Silver's claim for a level-of-trade adjustment upon the second reason stated by Commerce in its Final Results. *See Silver Reed*, 7 CIT at 30–32, 581 F. Supp. 1295–1296.

CONCLUSION

As we have seen, ITA erroneously deducted from the ESP for Silver's PETs imputed exchange rate losses and erroneously "double-counted" certain expenses respecting Silver's PETs. The court finds that ITA also erred in imputing an interest expense for the period between shipment of the merchandise from Japan and the entry of that merchandise in the United States, *viz.*, "time on the water." ITA is further directed to ascertain whether a credit expense was erroneously imputed for the "transfer of funds period," and if so, correct such error. Finally, ITA shall reconsider Silver's claim for a level-of-trade adjustment and advise the court fully of its reasons for rejection of the evidence Silver submitted on that matter.

ITA's Final Results in all other respects are sustained since they are supported by substantial evidence in the administrative record and are otherwise in accordance with law.

ORDERED that the Final Results of Commerce in its first administrative review of the antidumping order respecting PETs from Japan is reversed in part, and this case is remanded to Commerce for additional proceedings consistent with this opinion. ITA shall report to this court the results of remand within 90 days from the date of this order.

(Slip Op. 88–6)

AIR CARGO SERVICES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85–11–01675

Before RAO, *Judge.*

(Defendant's motion to dismiss granted)

(Dated January 13, 1988)

Where the corporation that applied for a container station license had not begun doing business and was not capitalized, the United States Customs Service did not abuse its authority in denying the application on the basis of contradictory affidavits and sworn statements as to Drug Enforcement Administration investigations of one

principal's other container station activities and evidence that a drug "drop" had been made at said principal's other container station.

Krupnick & Goldman (Sheldon M. Krupnick and *Charles Holster* on the brief and at the argument) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Florence M. Peterson* on the brief and at the argument) for the defendant.

RAO, *Judge:* This civil action involves the denial by the United States Customs Service (Customs) of an application for a license to operate a container station near JFK International Airport, New York. It is before the Court on defendant's motion to dismiss, or alternatively, for judgment on the administrative record, and plaintiff's opposition thereto.

Plaintiff is a domestic corporation having three principals: Anthony Evangelista, Frank Pomponio and Paul Oike. Mr. Evangelista currently operates Sumo Container Station, a separate entity, under a license issued to him by Customs in 1978. He is the president and sole shareholder of Sumo.

At the time that plaintiff corporation applied for the license, it had not been capitalized nor commenced doing business. Customs did a background check on the principals, which disclosed that Mr. Evangelista had rehired one William Charrocks on his release from federal prison. Sharrocks had been found guilty of possession and conspiracy to distribute marijuana as a result of a Drug Enforcement Administration (DEA) investigation at JFK Airport, which involved the unloading of restricted substances at or near the Sumo Container Station, as well as transactions involving the smuggling of millions of dollars worth of illicit drugs through airline freight facilities and Customs licensed container facilities. Customs also investigated one Donald Brown, who had testified under oath that approximately 11,000 pounds of marijuana had been unloaded at the Sumo warehouse. Sharrocks had also admitted under oath to unloading drugs at the Sumo warehouse.

After counsel for plaintiff met twice with Customs officials to discuss the application for the container station license and in August, 1984, Customs informed plaintiff's counsel that the license would be denied, based on the results of the investigation. Plaintiff, through counsel, requested an opportunity to file additional written submissions, including affidavits. Customs commenced a second investigation based on plaintiff's submissions, and on the basis of it's findings, formally denied the application. Subsequently, Customs also denied a further request for a formal conference to discuss the denial.

This civil action followed, plaintiff claiming that the processing of the application for a container station license was accomplished in derogation of the Administrative Procedure Act and of the due process clause of the Constitution. Plaintiff also claimed that the drug transaction that was the subject of the DEA investigation did

not occur on Sumo premises, and that the denial of the application was arbitrary, capricious and without substantial basis in fact.

Defendant claims that the Court of International Trade lacks jurisdiction over the subject matter of the action, that plaintiff has failed to state a cause of action and alternatively, that the denial of the license application was based on thorough administrative review and was not arbitrary, capricious or unsubstantiated by the facts.

I

JURISDICTION

Plaintiff's jurisdictional claim is under 28 U.S.C. §§ 1581, 2201 and 2202 and under 5 U.S.C. §§ 701, 704 and 706. Without reviewing each of these provisions, this Court decides that jurisdiction exists pursuant to 28 U.S.C. § 1581(i)(1) and § 1581(i)(4). Section 1581(i) states that this Court possesses jurisdiction over an action that arises out of any law of the United States providing for:

(1) revenue from imports or tonnage;
(2) tariffs, duties, fees or other taxes on the importation of merchandise for reasons other than the raising of revenue;
(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

Although there is no express statutory authority for Customs to regulate or license container stations, the provisions of 19 U.S.C § 66 grant Customs (through the authority of the Secretary of the Treasury) the power to prescribe "rules and regulations not inconsistent with law, to be used in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to warehousing and shall give such direction to customs officers and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law."

A thorough analysis and review of Congressional intent and the legislative history of § 1581(i)(1) and (4) was given in *DiJub leasing Corp. et al.* v. *United States,* 1 CIT 42, 505 F.Supp. 1113 (1980), and in *Bar Bea Truck Leasing Co.* v. *United States et al.,* 4 CIT 104 (1982), cases involving the revocation of a cartman's license (*DiJub*) and the denial of an application for a cartage license (*Bar Bea Truck*) and we adopt the reasoning in those decisions in concluding that the rational expressed in those cases is equally applicable here, especially the following:

> The rationale expressed above by the House Committee on the Judiciary for reposing jurisdiction in the Court of International Trade of actions involving customhouse brokers' licenses

is equally apposite to actions contesting the revocation of a cartman's license.

Since the primary purpose of licensing cartmen is for the protection of the governmental revenue from imports, this action arises out of the administration and enforcement with respect to a law of the United States providing for revenue from imports within the purview of 28 U.S.C. §§ 1581(i)(1) and (4). Consequently, while the doctrine of expressio unius exclusio alterius would plainly exclude cartmen's license proceedings from 28 U.S.C. § 1581(g), that doctrine does not preclude this court's jurisdiction to review the revocation of such licenses pursuant to the residual grant of jurisdiction in section 1581(i). *Bar Bea Truck, supra* at 104, 105.

The Court decides that the primary purpose of licensing container stations is for the protection of governmental revenue from imports and that the instant action arises under 28 U.S.C. § 1581(i).

II

Merits of the Claim

The Court next considers whether the denial of the cargo container station application was proper and in accordance to law. The parties agree that there are no statutes or regulations which set standards to be applied in the consideration of these types of license applications. Accordingly, the standard of review to be applied is whether the agency action was arbitrary, capricious or otherwise unlawful. For the following reasons, the Court determines that Customs' denial of the license application was lawful.

There was ample sworn testimony and other evidence that the Sumo warehouse had been used as a "drop" for narcotics smuggling during the DEA investigation at JFK Airport. Even though Mr. Evangelista was not found personally to be chargeable with any crime, it can be concluded that illegal activities were conducted on Sumo premises (ostensibly without Mr. Evangelista's knowledge) and no representations were made to Customs that additional security measures would be taken so that such activity would not occur at the Air Cargo premises. If similar management techniques were to be employed, it is possible that similar activities might occur at the container station contemplated in the application.

The Court refrains from drawing conclusions on the wisdom of Mr. Evangelista's decision to hire William Sharrocks on his release from prison. Standing alone, the decision to employ a person who has paid his debt to society and is seeking rehabilitation through honest employment would commend Mr. Evangelista. However, since the employment could place William Sharrocks in situations involving duties and breaches similar to those at Sumo, Custom's action in giving negative weight to Mr. Evangelista's willingness to reemploy Sharrocks, if such reemployment could result in additional breaches of security, was justified.

Each of the affidavits submitted by plaintiff in its second submission in support of the license application attempts to put the marijuana "drop" at a vacant lot adjacent to the Sumo installation rather than on Sumo premises. However, this sworn testimony conflicts with sworn testimony of both Donald Brown and William Sharrocks at pretrial depositions and during trial, and details of that testimony were not refuted in the submitted affidavits. For example, Donald Brown testified on two occasions that on the night of the "drop" at Sumo he called Sharrocks inside the Sumo warehouse, using a code name, to inquire as to how long the transfer of the marijuana would take. This testimony was not believably contradicted in the supporting affidavits except for a statement that the call had been placed to Brown from an unidentified pay phone on a cold, sleety night when Brown was at the Owl Tavern, in close proximity to the Sumo locale.

Mr. Evangelista's sworn testimony is to the effect that he was not at any time aware that he or Sumo was under investigation with respect to drugs and that he was advised by Customs to terminate Mr. Sharrock's employment. Both these statements are refuted by the Customs special agent in charge of the investigation who stated that Mr. Evangelista was questioned at length by DEA agents and was even read his "Miranda rights" with respect to the questionning. Senior Special Agent James Coble also stated that he believed that he and Special Agent Andre Flores were the only contacts from Customs that Mr. Evangelista had with respect to Sharrock's employment and that neither of them had suggested or demanded that Sharrocks be fired.

The supporting affidavits also attempt to establish that the "drop" had been made on a vacant lot adjacent to the Sumo premises via a statement to the effect that if the truck had indeed backed into a loading dock at Sumo, the cab portion of the truck would have protruded into the roadway, causing a hazard to walkers in the area. It seems highly improbable that a loading dock, which presumably is often used to unload large trucks, would be built in such a manner that when in use, it would impede other traffic.

Although each of these factors, taken alone, might not constitute sufficient ground for the denial of the application, it is the decision of this Court that these factors, and particularly the inconsistencies in the sworn testimonies concerning the location of the marijuana "drop", could lawfully lead Customs to conclude that, in protection of the governmental revenue, the license application should be denied. In cases where the Court reviews the agency decision for legality, the Court does not substitute its judgment for that of the agency, but decides whether the agency record contains sufficient facts to support the agency action. The Court decides that in this case, the administrative record supports the agency action.

Therefore, upon consideration of the parties' submissions, the administrative record, upon all papers and proceedings had herein and upon due deliberation, it is hereby

ORDERED, ADJUDGED AND DECREED that defendant's motion be, and is granted and that this action be and hereby is dismissed.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and rate
C88/1	DiCarlo, J. January 5, 1988	Hewlett-Packard Co.	85–7–00972	Item 712.05 19.4%, 17.5%, or 15.6%
C88/2	DiCarlo, J. January 5, 1988	Hewlett-Packard Co.	86–1–00130	Item 712.05 17.5%, 15.6%, or 13.8%
C88/3	DiCarlo, J. January 5, 1988	Hewlett-Packard Co.	86–7–00964	Item 712.05% 13.8%
C88/4	DiCarlo, J. January 5, 1988	Hewlett-Packard Co.	86–12–01512	Item 712.05% 13.8%
C88/5	DiCarlo, J. January 5, 1988	Hewlett-Packard Co.	87–2–00305	Item 712.05 13.8%
C88/6	Restani, J. January 6, 1988	Import Associates Inc.	84–1–00086	—
C88/7	DiCarlo, J. January 7, 1988	Associated Lerner Shops	86–7–00958	Various item numbers and rates
C88/8	DiCarlo, J. January 7, 1988	Audiovox Corp.	86–4–00474	Various item numbers and rates
C88/9	DiCarlo, J. January 7, 1988	Pharmacia Inc.	84–11–01694	Item 711.88 9.2% Item 712.4960 8.1%

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
	Item No. and rate		
	Item 712.49 Various rates	EAC Engineering v. U.S. S.O. 85–111	San Francisco Major subassemblies & parts of liquid chromatographs
	Item 712.49 Various rates	EAC Engineering v. U.S., S.O. 85–111	Philadelphia San Francisco Major subassemblies & parts of liquid chromatographs
	Item 712.49 6.2%	EAC Engineering v. U.S., S.O. 85–111	Philadelphia Major subassemblies & parts of liquid chromatographs
	Item 712.49 6.2%	EAC Engineering v. U.S., SO. 85–111	Philadelphia Major subassemblies & parts of liquid chromatographs
	Item 712.49 6.2%	EAC Engineering v. U.S., S.O. 85–111	Philadelphia Major subassemblies & parts of liquid chromatographs
	Item 700.35 8.5%	Agreed statement of facts	Seattle Boy's and mens's jogger shoes
s	Item 688.36 4.5%	U.S. v. Texas Instruments Inc., 69 CCPA 136 (1982)	New York Electronic watches
s	Item 678.50 4%	Agreed statement of facts	New York Combination radio/tape players
	Item 661.95 4.9% Item 774.65 7.3%	Pharmacia Fine Chemicals, Inc. v. U.S., 9 CIT 438 (1985)	New York "Prepacked Column Mono Q," etc.

ABSTRACTED CLASSIFICATION D

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	
C88/10	Re, C.J. January 14, 1988	New York Merchandise Co.	81-5-00621	Item 206.98 8%	It

DECISIONS — Continued

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
Item No. and rate		
Item A203.30 Free of duty	Agreed statement of facts	Los Angeles Woven wood ashtrays

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
V88/1	Watson, J. January 15, 1988	Trans Continental Commercial Co.	R61/22100	Export value
V88/2	Watson, J. January 15, 1988	W.J. Byrnes & Co.	R58/22695, etc.	Export value
V88/3	Watson, J. January 15, 1988	W.J. Byrnes & Co.	R58/22699	Export value

UATION DECISIONS

	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	F.o.b unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios, together with their accessories and parts
	Appraised values less 7.5% thereof	Agreed statement of facts	New York Silk articles
	Appraised values less 7.5%	Agreed statement of facts	New York Silk twill

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Index

Customs Bulletin and Decisions
Vol. 22, No. 6, February 10, 1988

Treasury Decisions

Proposed Rulemaking

U.S. Court of Appeals for the Federal Circuit

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

*U.S. G.P.O. 1988- 201-627:40076